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No. 1.

THE DOCTRINE OF DIVISIBLE CONTRACTS.

A very familiar contract, in these days of great commercial enterprises, is one in which the engagement of at least one of the parties is multiple in form. What is the effect of a default in the performance of a single item in such a multiple engagement? May the party not in fault, in the absence of an express condition, repudiate the contract so far as it is unperformed, or is he confined to his remedy in damages for the breach? The question was early discovered by the courts to be a somewhat difficult one, and apparently with the purpose of establishing a guiding rule of construction, an endeavor has been made to classify contracts of this kind as "entire" and "divisible," or "entire" and "severable." That is to say, if the contract in a particular case be construed as entire, the violation by one party of one of the several parts or divisions of his engagement is held to relieve the other party wholly from his engagement under the contract, while if the contract be construed as divisible, the other portions of the contract remain unaffected and the party suffering from the breach is confined to his action for damages.

It is submitted that the adoption of this classification, instead of simplifying the problem, has resulted in considerable mis-

apprehension and confusion. That such has been its effect, however, is not surprising, when we consider the nature of the classification and the method of its application. The principle is fundamental, that whether the party suffering from a breach of contract is justified in refusing further to perform his engagement, or is confined to his action for damages, depends entirely upon the character of the breach. If the term violated is one the performance of which appears to have been regarded by the parties at the time of making the contract as essential to its continued existence as a binding agreement, further performance may legally be refused: if not, the obligation to perform is unaffected. In every case this is the final test, and whatever may be the form of the contract, its application is uniform. To put it briefly, it is not the nature of the *contract*, but the nature of the *breach*, that controls. In some of the leading cases arising under contracts of the class under consideration, this distinction appears to have been kept clearly in mind, and the terms "entire contract" and "divisible contract" to have been used to describe a result rather than a cause. That is to say, if the breach be of an essential term, the contract is entire; if of a non-essential term, the contract is divisible.¹ Even when the terms are used in this sense, the classification is open to criticism. Thus, in two cases, involving contracts almost identical in terms, it may be found that while in one the breach reaches the essence and the contract is therefore entire, in the other the term violated is a non-essential term and the contract is therefore divisible. Indeed, it is quite conceivable that in an action for breach of a non-essential term, a contract might be found to be divisible, and in a subsequent action for breach of a more important provision, the same contract be declared to be entire. This is well illustrated by the English decisions on instalment contracts of sale, to be discussed at some length hereafter. Suffice it to say at this point, that in an action for default in the engagement to *deliver* an instalment, the English courts, in effect, hold such contracts to be entire,² while in an action for default

¹ See *Norrington v. Wright* (1885), 115 U. S. 188.

² *Hoare v. Rennie* (1859), 5 H. & N. 19.

in *payment*, they declare them to be divisible.¹ And such would also be the logical result, even though the same contract were involved in the two actions.

The existing confusion is chiefly attributable, however, to the fact that many judges, apparently misled by the usage to which we have referred, have seemed to think that the cases turn upon the nature of the contract. And inasmuch, for example, as all ordinary instalment contracts for the sale of merchandise are substantially similar in character, it is obvious, they appear to reason, that such contracts cannot in one case be entire and in another divisible, but must always be regarded as belonging either to one class or the other. One of the consequences of this conclusion is that the leading English authorities on instalment contracts are very commonly regarded as being hopelessly in conflict, whereas we shall try to show that the real disagreement among them is very slight. Another consequence is that in many of the cases there appears to be a tendency, more or less clearly evidenced by the language of the opinions, to excuse a party suffering from a breach from further performance, or confine him to his action for damages, as the case may be, not because of the extent of the breach or of the importance in the contemplation of the parties of the term violated, but because the character of that class of contracts, as entire or divisible, has been established by prior authorities.

Aside from the difficulties already mentioned, which possibly are the natural results of the apparently unscientific nature of the classification, there is one of less importance growing out of its nomenclature. The terms "entire" and "divisible," "severable" or "separable," have come to be variously used, and consequently to be more or less indefinite in meaning. Thus they are frequently employed, and with entire propriety, in distinguishing a contract in which full performance is a condition precedent to the payment of any part of the consideration, from one in which part of the consideration accrues upon partial performance. *Baker v. Higgins* (1860), 21 N. Y. 397, affords a good illustration of this usage. In that case, under

¹ *Mersey v. Naylor* (1884), 9 App. Cases 434.

a contract to "deliver 25,000 pale brick for \$3 per M, and 50,000 hard brick at \$4 per M cash," the plaintiff delivered 10,500 hard and 10,500 pale brick and then demanded payment for that quantity. The defendant refused to pay until the entire quantity was delivered, contending that the brick was not to be paid for as delivered, but only upon the complete performance of the contract. This the court held to be the true import of the agreement, saying, "The contract was *entire*, to deliver 75,000 bricks, and the plaintiff was not entitled to pay for any part until the whole was delivered, or until he was ready and offered to deliver the balance."¹ Obviously a contract might be divisible in this use of the terms, while entire in the sense that breach as to one item would excuse further performance by the other party. The same nomenclature is employed again with reference to contracts called in question because of illegality, in which case, of course, the question is rather one of severability of subject-matter than of intention of the parties.² Moreover, the term "divisible contract" is commonly applied to transactions involving several distinct and entirely separate contracts, the courts in some instances making no distinction between such several contracts and a single so-called severable contract,³ and in others regarding all transactions as entire contracts, except those which in reality constitute several distinct and separate agreements.⁴

In view of what has been said, it is ventured to suggest that much might be gained in the direction of simplicity and clearness:

First, by abandoning the use, in this connection, of the terms "entire" and "divisible."

Second, by classifying the contracts under discussion as

¹ See also *Gill v. Johnstown Lumber Co.* (1892), 151 Pa. 534; *Note to Huyett v. Chicago Edison Co.* (1897), 59 Am. St. Rep. 277. The term "apportionable" is used by Parsons in this connection, "divisible" contracts being classified by him as apportionable or unapportionable. See Parsons on Contract (8th Ed.) Vol. 2, p. 637.

² See *Osgood v. Bander* (1888), 75 Iowa 550; *Wooten v. Walters* (1892), 110 N. C. 251; *Anson on Contracts* (Huffcut's Ed.) pp. 253-5.

³ See *Gerli v. Poidebard Silk Co.* (1895), 57 N. J. L. 432 at 438; *Parsons on Contracts* (8th Ed.), Vol. 2, p. 634, *note*.

⁴ See *Barrie v. Earle* (1886), 143 Mass. 1.

follows: (a) Unapportioned contract—one in which there is an engagement consisting of several items or divisions for a single and unapportioned consideration. (b) Apportioned contract—one in which there is an engagement consisting of several items or divisions for a single but apportioned consideration.

Third, by strictly confining the use of the foregoing classification to its proper purpose—that of description merely, so that it may be clear in every case, whether of unapportioned or apportioned contract, that the effect of a breach depends not upon the nature of the contract involved, but upon the character of the breach itself.

With these suggestions in mind, we have now to proceed to the examination of some of the adjudged cases. At the beginning, however, it is necessary carefully to distinguish the case of a mere breach of one item from that of a breach accompanied by such conduct on the part of the person committing it as amounts to an abandonment or renunciation of the entire contract. What conduct is sufficient depends in great measure, of course, upon the circumstances of each particular case, the general rule being that the circumstances should be such as to give reasonable ground for believing that the party in default does not intend to go on with the contract.¹ Whether a *refusal* to perform, as distinguished from a mere *failure* to do so, would be sufficient in all cases, may perhaps fairly be doubted. But if such refusal is positive and unqualified, the inference of an intention to renounce would seem to be inevitable.²

It should also be borne in mind that the right to repudiate because of a breach may be lost by waiver. As was pointed out in *Morgan v. McKee* (1874), 77 Pa. 228, the election to repudiate must be promptly communicated, and undue delay

¹*Withers v. Reynolds* (1831), 2 Barn. & Adol. 882; *Bloomer v. Bernstein* (1874), L. R. 9, C. P. 588; *Otis v. Adams* (1893), 56 N. J. L. 38; *Gerli v. Poidebard Silk Co.* (1895), 57 N. J. L. 290; *Armstrong v. St. Paul Iron Co.* (1891), 48 Minn. 113; *Forsyth v. North Am. Oil Co.* (1866), 53 Pa. 168.

²See *Forsyth v. North Am. Oil Co.* (1866), 53 Pa. 168, and other cases cited above.

must be regarded as a waiver of the right to repudiate and an election to treat the contract as still subsisting.¹

Unapportioned Contracts.—Of this class of contracts, comparatively little need be said. In the case of a contract consisting of a single promise for a single consideration, the two engagements are now generally, though not invariably, construed as dependent, so that a breach by one party excuses performance by the other.² In the case of an engagement consisting of several items, given for an unapportioned consideration, a breach of a single item must be followed by the same result. This for two reasons—first, because it is impossible to separate the portion of the consideration given for the broken item from the portion given for the other items; and second, because the fact that the consideration was not apportioned by the parties to the several items is evidence that they regarded the performance of each and all of the items as essential to the contract. The first of these reasons, although undoubtedly sufficient and indeed the one commonly given, is open to criticism in that it tends to convey the impression that if, conversely, the consideration for the several items be apportioned, the party suffering from the breach is confined to his remedy in damages. This, of course, is not true. The second reason accords perfectly with the general principle governing conditions and warranties, and would therefore seem to be the more satisfactory.

The most interesting and perhaps the most difficult cases of unapportioned contract are those in which the contract is one for the construction of buildings, roads or public works, the contractor to be paid in fixed instalments at stated points in the progress of the work. These contracts have in some instances been regarded as apportioned and decided upon the authority of cases of that class. This is true, for example, of the case of *Bennett v. Shaughnessy* (1889), 6 Utah 273. There, the contract was one whereby the plaintiff agreed to excavate a tunnel twelve hundred feet in length along the

¹ See also *Clark v. Wheeling Steel Works* (1893), 3 U. S. App. 358; *Bollman v. Burt* (1883), 61 Md. 415; *Scott v. Kittanning Coal Co.* (1879), 89 Pa. 231.

² *Anson on Contracts* (Huffcut's Ed.), p. 362.

vein of certain mining properties of the defendants and to run cross-cuts across the vein at intervals of one hundred feet, the work to be paid for at the rate of twelve dollars per lineal foot for the tunnel and six dollars per foot for cross-cuts. The defendants agreed to pay one thousand dollars on the completion of each one hundred feet of the tunnel, and the balance (two dollars per foot) upon the completion of the entire tunnel; and further to pay five dollars per foot for running the cross-cuts at the time of completing each, and the balance (one dollar per foot) at the completion of the contract. The defendants failed to pay the second instalment of one thousand dollars when due, and plaintiff abandoned the work and brought action to recover for work already done and for materials furnished. The court held, and we believe rightly, that the failure to make partial payment at the time stipulated justified the plaintiff in repudiating the contract. But in the opinion of the court, no distinction is drawn between contracts of this kind and instalment contracts of sale, and the decision appears to rest, at least in part, upon the authority of *Norrington v. Wright*¹ and *Reybold v. Voorhees*,² both of which, as will be seen, are cases of apportioned contracts.

According to the better view, and that which has perhaps been more generally accepted, these so-called construction contracts are ordinarily unapportioned. In nearly all of them, as in that discussed above, the instalments are not in proportion to the work done, a part of the consideration being withheld until the completion of all the work contracted to be performed. It follows that each instalment is not intended to be in payment of any particular portion of the work, but "merely an advance of part payment for the whole, made for the contractor's convenience."³

The distinction, however, is really of little moment, for whether a contract of this kind be regarded as unapportioned or apportioned, the result is the same. The vital question in either case is, as we have tried to point out, does the breach go to the root of the contract? A failure to pay an instal-

¹ 115 U. S. 188.

² 30 Pa. 116.

³ *Parsons on Contracts* (8th Ed.), Vol. 2, p. 636, *note*.

ment on an ordinary construction contract unquestionably does. Such contracts usually require a considerable period of time and a large expenditure of money in their performance, and it is well known to parties entering into them that the engagement as to payment is of the first importance; that a failure to make a single stipulated payment may seriously embarrass the contractor, if indeed it may not actually force him to discontinue the work. In view of these conditions, it seems perfectly clear that in such contracts it should be presumed that the engagement to pay instalments is, in the contemplation of the parties, a term of such importance that a failure to perform it reaches the very vitals of the contract. So it has been held by the United States Supreme Court, in *Canal Company v. Gordon* (1869), 6 Wall. 561, where the contract was for the construction of a canal. By the terms of the contract, the contractors were to receive monthly payments in a specified way as the work progressed, and it was expressly provided that in case of failure of such partial payments the same should draw interest at a specified rate. Notwithstanding this provision as to interest on delayed payments, the court decided, apparently without hesitation, that a default in payment of one monthly instalment of \$20,000 justified an abandonment of work, and entitled the contractors to recover a fair compensation for all work done up to the time of quitting. Many similar cases have arisen in the State courts, and the decisions, so far as known, are uniformly to the same effect.¹

It should be noticed, in passing, that a construction or building contract may, by reason of some peculiarity, present an

¹ *Bennett v. Shaughnessy* (1889), 6 Utah 273; *Cox v. McLaughlin* (1880), 54 Cal. 605; *Graf v. Cunningham* (1888), 109 N. Y. 369; *Thomas v. Stewart* (1892), 132 N. Y. 580; *Strack v. Hurd* (1891), 41 N. Y. S. R. 777; *Preble v. Bottom* (1855), 27 Vt. 249; *McCullough v. Baker* (1871), 47 Mo. 401; *Bean v. Miller* (1879), 69 Mo. 384; *Mugan v. Regan* (1892), 48 Mo. App. 461; *Dobbins v. Higgins* (1875), 78 Ill. 440; *Geary v. Bangs* (1890), 37 Ill. App. 301; *Shulte v. Hennessey* (1875), 40 Iowa 352; *Phillips & Co. v. Seymour* (1875), 91 U. S. 646. See note in 30 L. R. A. at p. 67. Although the distinction is not clearly drawn, the failure to pay would seem, in some of the cases cited, to have amounted to a renunciation.

aspect entirely different from that of the contracts in the cases we have considered. An illustration of this is found in the case of *Broxton v. Nelson* (1898), 103 Ga. 327, where the contract was to construct not one but four houses, the owner agreeing to pay the contractor \$380 for the first house, \$407 for the second, \$476 for the third and \$380 for the fourth, "a total of \$1,643 for the four houses." Of course this is an apportioned contract, and is analogous in principle to contracts for the sale of goods by instalment, to be hereinafter discussed.¹

Apportioned Contracts.—There is a great variety of contracts belonging to this class. Perhaps the clearest type is found in the familiar mercantile contract for the sale of goods, in which it is provided that deliveries and payments are to be made in stated and apportioned instalments. It is to these, therefore, that our attention shall be devoted.

Of the English cases, there are four of particular prominence. In the leading one of *Hoare v. Rennie* (1859), 5 H. & N. 19, the contract was one for the sale of six hundred and sixty-seven tons of bar iron to be shipped from Sweden in June, July, August and September, and in about equal portions each month, at a certain price payable on delivery. The June shipment made by the seller was of only twenty tons, and the court held that the failure to ship about one quarter of the iron, as agreed, justified the buyer in refusing to receive the twenty tons shipped and excused him from the obligation to accept the residue of the iron. In the second case, *Simpson v. Crippin* (1872), L. R. 8 Q. B. 14, under a contract to supply from six thousand to eight thousand tons of coal to be taken by the buyer's wagons from the seller's colliery in equal monthly quantities for twelve months, the buyers sent wagons for only one hundred and fifty tons during the first months, and it was held that such failure on the part of the buyer did not give the seller the right to repudiate the entire contract. In the third case, *Honck v. Muller* (1881), L. R. 7, Q. B. D. 92, under a

¹ In *Broxton v. Nelson* (1898), 103 Ga. 327, the contract referred to in the text is said to be "entire." But see *Barnard v. McLeod* (Mich.) 72 N. W. Rep. 24, in which a similar contract appears to be regarded as "severable."

sale of two thousand tons of pig iron, to be delivered to the buyer free on board "in November, or equally over November, December and January next," the buyer failed take any iron in November and it was held that such failure justified the seller in repudiating the contract and refusing to make any subsequent delivery. In the fourth case, *Mersey Co., v. Naylor* (1884), L. R. 9, App. Cas. 434, the contract was for the sale of five thousand tons of steel to be delivered in monthly instalments of one thousand tons, and the buyers, acting under the erroneous advice of their solicitors, defaulted in the payment for one instalment when due. The court held that such failure to make payment for one instalment did not excuse the seller from proceeding with the delivery of subsequent instalments.

This last-mentioned case is one of great importance, and its doctrine seems to the writer to have been commonly misunderstood. Thus, upon its authority, the English rule has been said to be that a breach of an instalment contract does not excuse performance by the party not in fault, unless such breach is accompanied by conduct amounting to a renunciation.¹ And in support of this conclusion is quoted the language of Lord Chancellor Selbourne,² "You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part." Considered apart from its context, this language certainly sustains the conclusion stated above. But the Lord Chancellor continues, "I think that nothing more is necessary in the present case than to look at the conduct of the parties and see whether anything of that kind has taken place here. Before doing so, however, I must say one or two words in order to show why I cannot adopt

¹ See Burdick on Sales, p. 145; *Blackburn v. Reilly* (1885), 47 N. J. L., 290.

² Pp. 438-9.

Mr. Cohen's (of counsel) argument, as far as it represented the payments by respondents for the iron delivered as in this case a condition precedent, and coming within the rules of law applicable to conditions precedent. If it were so, of course there would be an end of the case, but to me it is plain beyond the possibility of controversy, that upon the proper construction of this contract it is not and cannot be a condition precedent. . . . But, quite consistently with that view, it appears to me, according to the authorities and according to sound reason and principle, that the parties might have so conducted themselves as to release each other from the contract, and that one party might have so conducted himself as to leave it at the option of the other party to relieve himself from a future performance of the contract." That is to say, a party may be excused from the further performance of his engagement, either by a breach of a condition precedent—an essential term—by the other party, or by the breach of a non-essential term under circumstances indicating a renunciation; and since in this case it is clear that the breach was not of an essential term, the question is: was there a refusal to perform amounting to a renunciation? This, then, we apprehend to be the true doctrine of the case, that a mere failure to pay for an instalment of goods when due, is not a breach of a vital term of the contract, and therefore does not excuse further performance by the other party unless such failure to pay is accompanied by conduct amounting to a renunciation of the entire contract. Such is clearly the import of Lord Blackburn's opinion,¹ and the rather indefinite opinions of Lord Watson² and Lord Bramwell,³ at least contain nothing to the contrary.

In view of these four leading cases, what may be said to be the law in England to-day? Applying the generally accepted classification, it appears that in two cases instalment contracts of sale are held to be entire, while in two other cases they are held to be divisible. Consequently, it has commonly been thought that the decisions discussed are hopelessly in conflict.

¹ P. 442.

² P. 445.

³ P. 446.

Indeed, in *Honck v. Muller*,¹ the judges themselves declare that they are unable to reconcile *Hoare v. Rennie*² with *Simpson v. Crippin*,³ and the same difficulty seems to have been experienced by Mr. Justice Gray in the leading American case of *Norrington v. Wright*.⁴ Under the application of the suggestions set forth in the first part of this paper, however, the confusion seems almost entirely to disappear. In all of the cases discussed, the contracts in question fall into the class of apportioned contracts, and inquiring in each case whether or not there was a vital breach of the contract, it is found that the English courts have determined that in the absence of evidence showing a different intention a failure to deliver an instalment goes to the essence, while a failure to pay for an instalment does not. The only real conflict is as to whether a failure to *take away* an instalment is a breach going to the essence of the contract, *Simpson v. Crippin*⁵ holding that it does not, and *Honck v. Muller*⁶ holding that it does. And since the latter is the more recent case, it would seem that it must be regarded as overruling the former. That such was in fact considered to be the effect of the decision is evidenced by the opinions of Lord Justices Baggallay and Brett,⁷ as well as by the circumstance that *Simpson v. Crippin*⁸ is entirely ignored by the judges in *Mersey v. Naylor*.⁹

Turning to the decisions in this country, it is found that as in England the existing confusion may be materially diminished by disregarding all attempted distinctions between entire and divisible contracts. With regard to a default in the engagement to deliver instalments, it is almost uniformly held, in accord with the English rule, that such a breach goes to the very life of the contract; that in the absence of evidence

¹ L. R. 7 Q. B. D. 92 (1881).

² 5 H. N. 19 (1859).

³ L. R. 8 Q. B. 14 (1872).

⁴ 115 U. S. 188 (1885).

⁵ L. R. 8 Q. B. 14 (1872).

⁶ L. R. 7 Q. B. D. 92 (1881).

⁷ Pp. 100-5.

⁸ L. R. 8 Q. B. 14 (1872).

⁹ L. R. 9 App. Cas. 434 (1884). See also *King Philip Mills v. Slater* (1878), 12 R. I. 82, at p. 90.

to the contrary it is to be presumed that the parties to a contract for the sale of goods by instalments contemplate the delivery of each instalment according to agreement as a condition precedent to further performance, and consequently that a failure so to deliver gives to the party not in fault the right of repudiating the entire contract.¹

The leading case of *Norrington v. Wright*² is a familiar one. The contract involved was for the sale of five thousand iron rails to be shipped at the rate of about one thousand per month. Only four hundred rails were shipped during the first month, and upon discovery of that fact the buyer notified the seller that he would refuse to accept any further shipments. In an action for breach of the contract by the seller, the Supreme Court sustained the position of the buyer, Mr. Justice Gray reviewing the English authorities and pointing out with perspicuity that in contracts of merchants time is of the essence; that a statement as to time of shipment should be regarded as a condition precedent upon the non-performance of which the party aggrieved may repudiate the contract; and that "when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month, gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once."

There would seem to be no sound reason for distinguishing a breach in the delivery of the first instalment, as happened to be the case in *Norrington v. Wright*,³ from a breach in the delivery of any subsequent instalment, and such is the view subsequently taken by the federal courts.⁴ It may be well

¹ *Norrington v. Wright* (1885), 115 U. S. 188; *Creswell v. Martindale* (1894), 27 U. S. App. 277; *Cleveland Rolling Mill v. Rhodes* (1887), 121 U. S. 255; *Pope v. Porter* (1886), 102 N. Y. 366; *Elting v. Martin* (1874), 5 Daly (N. Y. C. R.), 417; *King Philip Mills v. Slater* (1878), 12 R. I. 82; *Johnson v. Allen* (1884), 78 Ala. 387; *Ballman v. Burt* (1883), 61 Md. 415; *Robson v. Bohn* (1880), 27 Minn. 333; *Roebing v. Lock Stitch Fence Co.* (1888), 28 Ill. App. 184; *Smith v. Keith, etc., Co.* (1889), 36 Mo. App. 567; *Providence Coal Co. v. Coxe* (1896), 19 R. I. 380.

² 115 U. S. 188 (1885).

³ 115 U. S. 188 (1885).

⁴ *Creswell v. Martindale* (1894), 27 U. S. App. 277.

also to note, at this point, that not every act inconsistent with the terms of the agreement—not every trifling departure from the stipulations of the contract as to delivery, would reach the essence of the contract. The breach must be material and substantial. It must be such as to defeat the purpose of the contract, as contemplated by the parties. Thus, in the recent Alabama case of *Worthington v. Given*,¹ the contract requiring the delivery, by instalments of no stipulated quantity, of ore “free from foreign substance,” it was held that the delivery of a small quantity of ore that was not free from foreign substance did not justify a repudiation of the contract.

Of the small minority of cases which, dissenting from the weight of English and American authority, hold that delivery of one instalment is not a term essential to the life of the whole contract,² *Gerli v. Poidebard Silk Co.* (1895), 57 N. J. L. 432, while not the earliest, is perhaps the chief. The contract in this case was for the sale of thirty bales of silk, deliverable ten bales July 20 to 25, ten bales August 15, and ten bales September 1 to 10, each instalment to be paid for sixty days after delivery at \$5.90 per pound. In consequence of the lateness of the crop it was impossible for the sellers to make delivery of the first ten bales within the time specified, and after the expiration of an extension of time the buyer notified the sellers that it cancelled the contract because of the default and would decline to receive any of the merchandise ordered. The court held that the buyer was liable in damages for his refusal to accept the second and third instalments, declaring that in contracts for the sale of goods, to be executed by a series of deliveries and payments, defaults of either party with reference to one or more of the stipulated acts, will not discharge the other party from his obligation, unless the conduct of the party in default be such as to evince an intention to abandon the contract or a design no longer to be bound by its terms. In connection with the case, it should

¹ 24 So. Rep. 739 (1898).

² *Blackburn v. Reilly* (1885), 47 N. J. L. 290; *Gerli v. Poidebard Silk Co.* (1895), 57 N. J. L. 432. And see *Myer v. Wheeler* (1884), 65 Iowa 390.

be noted that one of the judges wrote a dissenting opinion of exceptional vigor.¹

In some of the cases which hold that a breach as to one instalment of a contract of sale does not affect the obligation of the parties as to subsequent instalments, the rule is somewhat differently stated. For example, in the Iowa case of *Myer v. Wheeler*,² it is said that "rescission of a divisible contract will not be allowed for a breach thereof, unless such breach goes to the whole consideration." This has been thought to constitute a different doctrine from that of *Gerli v. Poidebard Silk Co.*³ But it is submitted that the cases are not properly distinguishable. It is obvious that in the case of a contract in which the consideration is exactly apportioned between the several items of the engagement, a breach of one item cannot "go to the whole consideration" in the sense in which the phrase appears to be used by the Iowa court. Therefore, to say that repudiation will not be allowed for a breach unless such breach goes to the whole consideration, is in reality to say that repudiation will not be permitted in any case of apportioned contract.

With regard to the effect of a default in the payment of an instalment, the great preponderance of American authority⁴ supports a conclusion directly opposed to that reached by the English court in *Mersey v. Naylor*.⁵ One of the earliest cases and one which in fact was decided long before *Mersey v. Naylor*, is the Pennsylvania case of *Reybold v. Voorhees* (1858), 30 Pa. 116. There, the contract was for the sale of a crop of peaches, to be delivered from day to day and paid for at the

¹ Van Syckle, J., at p. 437.

² 65 Iowa, 390 (1884).

³ 57 N. J. L. 432 (1895). See Burdick on Sales, p. 146.

⁴ *Reybold v. Voorhees* (1858), 30 Pa. 116; *Rugg v. Moore* (1885), 110 Pa. 236; *Gardner v. Clark* (1860), 21 N. Y. 399; *Barnes v. Denslow* (1890), 30 N. Y. S. R. 315; *Kokomo Co. v. Inman* (1892), 134 N. Y. 92; *Curtis v. Gibney* (1882), 59 Md. 131; *McGrath v. Gegner* (1893), 77 Md. 331; *Branch v. Palmer* (1880), 65 Ga. 210; *DeLoast v. Smith* (1889), 83 Ga. 665; *Bradley v. King* (1867), 44 Ill. 339; *Hess v. Dawson* (1894), 149 Ill. 138; *Stakes v. Baars* (1882), 18 Fla. 656; *Palmer v. Breen* (1885), 34 Minn. 39.

⁵ L. R. 9 App. Cas. 434 (1884).

end of each week. The seller delivered the peaches, according to agreement, for a week, but at the end of that time neither the buyer nor any one on his behalf appeared at the place of delivery to pay for the peaches. On the following Monday the buyer again failed to appear and the seller thereupon discontinued the delivery, disposing of his peaches elsewhere. The court held the buyer's conduct entirely justifiable, Chief Justice Lowrie, without the guidance of a single authority, sensibly observing, "Neither party has any time to be wasted by the unpunctuality of the other; and neither is required to endure the anxiety of having his summer's success dependent on one who is not careful of his engagement. The success of both parties depends upon the performance of present duty."¹ In other words, the engagement to pay is just as essential as the engagement to deliver, and a breach of the one, as much as a breach of the other, goes to the existence of the whole contract. Of course, in those jurisdictions in which it is held that a failure to deliver a single instalment does not affect the obligation of the contract as to subsequent instalments, a failure to pay is governed by the same rule.²

There seems to be little distinction in principle between a contract for the sale of one kind of merchandise to be delivered and paid for in instalments, and a contract for the sale of several different articles or several kinds or grades of merchandise for an apportioned consideration. The rule governing such a case is very well stated in the early California case of *Norris v. Harris* (1860), 15 Cal. 256, in which the contract in question was one for the sale of slaves and cattle. "A contract, made at the same time, of different articles, at different prices," says the court, "is not an entire contract (*i. e.* a breach as to one article does not excuse performance as to others), unless the taking of the whole is essential from the character of the property, or is made so by the agreement of the parties, or unless it is of such a nature that a failure to obtain a part of the articles would materially affect the objects of the contract and thus have influenced the sale, had such failure been anti-

¹ p. 120.

² *Otis v. Adams* (1893), 56 N. J. L. 38; *Blackburn v. Reilly* (1885), 47 N. J. L. 290. See also *Tucker v. Billings* (1881), 3 Utah 82.

ipated." In the application of the rule to a recent case, however, we are constrained to believe that the court fell into error. In the case referred to, *Hersog v. Purdy* (1897), 119 Cal. 99, it appears that the defendant, a butcher, contracted to sell to plaintiff all the hides, calfskins, pelts and tallow of animals to be slaughtered by him during a certain period, the rate of compensation of each article being fixed. The plaintiff refused to take the hides, or at least failed to take them promptly, whereupon defendant declined to deliver the other articles and sold them elsewhere. The court held that the plaintiff might recover damages for failure to deliver the other articles mentioned in the contract, declaring that there was nothing in the case to show that the sale of one item was contingent upon the sale of the others. It would seem, on the contrary, that the express terms of the contract are strongly persuasive to the view that the defendant wished to dispose of all the articles he could not use in his business by a single contract; that a failure to dispose of some of the articles materially affected the object of the contract, and therefore, if it had been anticipated, would have materially influenced the terms of sale.

There are many other interesting cases of apportioned contracts, but inasmuch as the purpose of this paper is accomplished, little would be gained by the discussion of them here. The authorities already considered seem to show clearly that the decision of every case properly turns, not upon the form or nature of the contract, but upon the character of the term violated, as contemplated by the parties to the contract; that the classification of these contracts as entire and divisible has proved unsatisfactory and misleading; and that by avoiding the use of those terms and looking directly and solely to the breach, much of the confusion which has been supposed to exist disappears.

Frederic C. Woodward.

A HUNDRED AND TEN YEARS OF THE CONSTITUTION.—PART VII.

Between the two extremes, represented by Mr. Sherman and Mr. Read, there was a variety of opinion. But in general it seems to have been considered wise, if not essential, to have one branch of the National legislature elected by the people—and the other by the States—in order, as Mr. Pierce expressed it, that the people might be represented individually and collectively. Mr. Mason stated bluntly that under the existing Confederacy, Congress represented “*States*, and not the *people* of States; their acts operate on the *States*, not on *individuals*. The case will be changed in the new plan of government. The people will be represented; they ought therefore to choose the representatives.” And Mr. Wilson, in replying to Mr. Read, said, that he saw no incompatibility between the National and State governments, provided the latter were restrained to certain local purposes. Mr. Pinckney’s motion that the State legislatures should elect the first branch of the National legislature was lost by a vote of eight to three. Coming now to the question, How shall the second branch of the legislature be chosen? (which it will be remembered had been left undetermined when the “plan” was gone over for the first time), Mr. Dickinson—who had favored the election of the first branch by the people—at once proposed that the second branch should be chosen by the “individual legislatures”—and all through the debate which followed it seems to have been considered that the idea of proportionate representation should be carried out in this branch as well—although Mr. Pinckney suggested the dividing of the States according to size, into three classes, to be allowed, three, two, and one, representative in the second branch respectively. Mr. Mason thought the proposed method a good one—it was necessary to give to the States some voice in the National Government as a safeguard against encroachments by it. The motion was carried *nem. con.* While the members inclined, some a little in one direction, some a little in the other, there seems to

have been practical unanimity as to the desirability of a government founded upon both *State* and *people*—all apparently recognizing the wisdom of combining both; an absolutely radical departure from the underlying principle of the Articles of Confederation. A good illustration of this mental attitude is found in the apparently inconsistent motions and expressions of the individual members. As noted above, Mr. Pinckney was the mover of the resolutions giving to the *States* the power to choose the members of the second branch—the next day we find him moving to enlarge greatly the right of the National Legislature to negative State laws. His motion was “that the National Legislature should have authority to negative all laws which they shall judge to be improper.” This was certainly going pretty far—further, I imagine, than the most pronounced nationalist would go to-day. The motion was seconded by Mr. Madison, and advocated by him and Mr. Pinckney, and by Mr. Wilson and Mr. Dickinson. It was urged that experience had shown the tendency of the States to encroach on federal authority, and that they should be kept in subordination to the National Government. That either a general negative in State laws must be lodged in the National Government, or a resort to force would be the only alternative, etc. Mr. Gerry thought it would be better to resort to force than to grant such a power; and it so obviously left the smaller States at the mercy of the larger ones, that the motion was lost by a vote of seven to three.

The next question to be considered a second time, was the manner of choosing the National Executive. It will be remembered that this had been left undetermined. Mr. Gerry moved that the National Executive should be elected by the Executives of the States, whose proportion of votes should be the same with that allowed to the States in the election of the Senate.” The suggestion in the “Virginia plan” had been that the Executive should be chosen by the National legislature. Mr. Gerry’s idea was that the first branch of the National legislature being chosen by the *people*, the second by the *legislatures* of the *States*, the Executive might appropriately be chosen by the State Executives. But this was opposed by Mr. Randolph upon the ground that such an Executive

would not command the confidence of the people, and would not be likely to defend the National Government from State encroachments—and also that the small States would have little chance of the appointment being made “from within themselves.” The motion was unanimously defeated—it is impossible to say upon what grounds—as there were objections to it from both the Nationalistic and “State rights” points of view. The consideration of the clause relating to the rule of suffrage in the National legislature was then resumed on motion of Mr. Patterson. This was one of the most serious and important questions before the Convention. It must be remembered that there were three large States—Virginia, Pennsylvania and Massachusetts—and nine small ones, excluding Rhode Island. Were nine small States, under the “unit rule,” to have the power utterly to overwhelm three large ones, with a population nearly if not quite equal to their own? On the other hand, were three large States, *i. e.*, three collectivities in fixed geographical positions, to control, or at least easily hold the balance of power over, nine differently situated smaller collectivities? The second alternative was so abhorrent to Delaware, at least, that she instructed her delegation not to assent to any plan denying equal representation to each and every State.

Of course, as a matter of fact, it would be most unlikely that the three large States or the nine smaller ones, should always be grouped together. And it really would seem that in its last analysis the real question was whether the new “government” should be a league (instead of a government in any true sense), wherein of course the co-equality of its members would be preserved—or a real government wherein the people should be represented *as such*—no matter how absolutely the right of local self-government in various communities should be secured.

The apparent unfairness of either plan of suffrage led to the radical suggestion by Mr. Brearly, of New Jersey, that the map of the United States be made over again, old boundaries erased, and thirteen equal States created. But this was of course impracticable. Mr. Patterson squarely insisted on lack of power in the Convention to do more than recommend alterations of or amendments to the Articles of Confederation,

and that nothing inconsistent with the principles of those articles could with propriety be considered. New Jersey would never consent to the plan proposed—she would be “swallowed up.” Issue was squarely joined with him by Mr. Wilson, who hoped that at least some of the States would combine for their safety in a government founded on the people. “If New Jersey will not give up her sovereignty, it is vain to talk of government.” And Mr. Williamson likened States to counties within the same State, arguing that proportionate representation being admittedly proper in the case of counties, it was equally so in the case of States. Mr. King and Mr. Wilson moved “that the right of suffrage in the first branch of the National Legislature ought not to be according to the rule established in the Articles of Confederation, but according to some equitable ratio of representation.” And this motion finally prevailed by a vote of seven to three—Maryland being divided. The “noes” were: New York, New Jersey and Delaware. Now, this grouping I consider quite significant. New York had been a troublesome member of the confederation; had shown a most “unfederal” disposition, as before noted, and two of her delegates, Yates and Lansing, were pronounced and determined anti-nationalists; they could outvote Hamilton, and generally did so. New Jersey was represented by Mr. Patterson, of the same stamp, and Delaware, as we know, was from the first opposed to any scheme for proportionate representation. Never was an issue more squarely put before a convention than was this one, and yet the decided majority was found to be against the views of Mr. Patterson, *and it continued to be so to the end.* Having determined that there should be some equitable basis, the question was, what should that basis be? In answer to this question Mr. Rutledge, seconded by Mr. Butler, moved that the representation be “according to the quotas of contribution.” This was postponed in order to consider a motion by Mr. Wilson, seconded by Mr. Pinckney, that it be “in proportion to the whole number of white and other free citizens and inhabitants of every age, sex and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description,

except Indians not paying taxes, in each State." It was explained that this was the existing rule for apportioning quotas of revenue in the States.

This motion prevailed in spite of a suggestion by Mr. Gerry, that you might as well make horses and cattle the basis of representation in the North as slaves in the South. The vote was ten to two, New Jersey and Delaware, of course, declining to countenance proportionate representation of every kind. It was now moved by Mr. Sherman that in the second branch each State should have one vote, and Connecticut, Maryland and New York joined Delaware and New Jersey in voting for this motion; but the other six States were "contrary-minded" and the motion was lost, and immediately afterwards a motion that the representation in the second branch should be according to the same ratio as in the first branch was carried, the States dividing as before.

The next two days were consumed in considering again the remaining resolutions in the "plan," without anything of especial interest in our immediate inquiry being said or done, and on June 13 the committee of the whole was ready to report to the Convention. I propose now, to juxtapose the various resolutions as originally drawn in the "Virginia plan" and the corresponding resolutions in this report, calling the former "A" and the latter "B."

1. A. *Resolved*, That the articles of confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution, namely, "common defence, security of liberty and general welfare."

B. *Resolved*, That a National government ought to be established, consisting of a supreme legislature, executive and judiciary.

2. A. *Resolved*, That the National Legislature ought to consist of two branches.

B. The same.

3. A. *Resolved*, That the members of the first branch of the National Legislature ought to be elected by the people of the several States every ———, for the term of ———; to be of the age of ——— years at least; to receive liberal stipends, by which they may be compensated for the devotion

of their time to the public service ; to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the first branch during the term of service, and for the space of ——— after its expiration ; to be incapable of re-election for the space of ———, after the expiration of their term of service, and to be subject to recall.

B. Resolved, That the members of the first branch of the National Legislature ought to be elected by the people of the several States for the term of three years ; to receive fixed stipends by which they may be compensated for the devotion of their time to the public service, to be paid out of the National Treasury ; to be ineligible to any office established by a particular State, or under the authority of the United States (except those peculiarly belonging to the functions of the first branch), during the term of service, and, under the National Government, for the space of one year after its expiration.

4. *A. Resolved,* That the members of the second branch of the National Legislature ought to be elected, by those of the first, out of a proper number of persons nominated by the individual legislatures ; to be of the age of — years at least ; to hold their offices for a term sufficient to insure their independency ; to receive liberal stipends, by which they may be compensated for the devotion of their time to the public service ; and to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the second branch, during the term of service, and for the space of ——— after the expiration thereof.

B. Resolved, That the members of the second branch of the National Legislature ought to be chosen by the individual legislatures ; to be of the age of thirty years at least ; to hold their offices for a term sufficient to insure their independence, namely, seven years ; to receive fixed stipends by which they may be compensated for the devotion of their time to the public service, to be paid out of the National Treasury ; to be ineligible to any office established by a particular State, or under the authority of the United States (except those pecu-

liarily belonging to the function of the second branch), during the term of service, and, under the National Government, for the space of one year after its expiration.

5. A. *Resolved*, That each branch ought to possess the right of originating acts.

B. The same.

6. A. (In the "plan" this is a continuation of the last resolution.) That the National Legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation, and moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several States contravening, in the opinion of the National Legislature, the Articles of Union, or any treaty subsisting under the authority of the Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof.

B. *Resolved*, That the National Legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation; and moreover, to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several States, contravening, in the opinion of the National Legislature, the Articles of Union or any treaty subsisting under the authority of the Union.

7. A. *Resolved*, That the rights of suffrage in the National Legislature ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as one or the other rule may seem best in different cases.

B. *Resolved*, That the rights of suffrage in the first branch of the National Legislature ought not to be according to the rule established in the Articles of Confederation, but according to some equitable ratio of representation; namely, in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three-fifths of all

other persons, not comprehended in the foregoing description, except Indians not paying taxes, in each State.

Resolved, That the right of suffrage in the second branch of the National Legislature ought to be according to the rule established for the first.

8. A. *Resolved*, That a National Executive be instituted; to be chosen by the National Legislature for the term of—; to receive punctually, at stated times, a fixed compensation for the service rendered, in which no increase or diminution shall be made so as to affect the magistracy existing at the time of increase or diminution; and to be ineligible a second time; and that, besides a general authority to execute the national laws, it ought to enjoy the executive rights vested in Congress by the Confederation.

B. *Resolved*, That a National Executive be instituted, to consist of a single person, to be chosen by the National Legislature, for the term of seven years, with power to carry into execution the national laws, to appoint to offices in cases not otherwise provided for, to be ineligible a second time, and to be removable on impeachment and conviction of malpractices or neglect of duty; to receive a fixed stipend by which he may be compensated for the devotion of his time to the public service, to be paid out of the National Treasury.

9. A. *Resolved*, That the Executive, and a convenient number of the national judiciary, ought to compose a council of revision, with authority to examine every act of the National Legislature before it shall operate, and every act of a particular legislature before a negative thereon shall be final; and that the dissent of the said council shall amount to a rejection, unless the act of the National Legislature be again passed, or that of a particular legislature be again negatived by — of the members of each branch.

B. *Resolved*, That the National Executive shall have a right to negative any legislative act which shall not be afterward passed by two-thirds of each branch of the National Legislature.

10. A. *Resolved*, That a national judiciary be established, to consist of one or more supreme tribunals and of inferior tribunals, to be chosen by the National Legislature, to hold

their offices during good behavior, and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the jurisdiction of the inferior tribunals shall be to hear and determine, in the first instance, and of the supreme tribunal to hear and determine in the *dernier resort*, all piracies and felonies on the high seas; captures from an enemy; cases in which foreigners, or citizens of other States, applying to such jurisdictions, may be interested, or which respect the collection of the national revenue, impeachment of any national officer, and questions which may involve the national peace and harmony.

B. *Resolved*, That a national judiciary be established, to consist of one supreme tribunal, the judges of which shall be appointed by the second branch of the National Legislature, to hold their offices during good behavior, and to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution.

Resolved, That the National Legislature be empowered to appoint inferior tribunals.

Resolved, That the jurisdiction of the national tribunals shall extend to all cases with respect to the collection of the national revenue, impeachments of any national officer and questions which involve the national peace and harmony.

11. A. *Resolved*, That provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory or otherwise, with the consent of a number of voices in the National Legislature less than the whole.

B. The same.

12. A. *Resolved*, That provision ought to be made for the continuance of Congress, and their authorities and privileges, until a given day after the reform of the articles of union shall be adopted, and for the completion of all their engagements.

B. The same.

13. A. *Resolved*, That a republican government, and the territory of each State, except in the instance of a voluntary junction of government and territory, ought to be guaranteed by the United States to each State.

B. *Resolved*, That a republican constitution, and its existing laws, ought to be guaranteed to each State by the United States.

14. A. *Resolved*, That provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary; and that the assent of the National Legislature ought not to be required thereto.

B. *Resolved*, That provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary.

15. A. *Resolved*, That the legislative, executive, and judiciary powers, within the several States, ought to be bound by oath to support the Articles of Union.

B. The same.

16. A. *Resolved*, That the amendments which shall be offered to the Confederation by the Convention, ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the general legislatures, to be expressly chosen by the people, to consider and decide thereon.

B. The same.

This juxtaposition brings out very clearly the result of the deliberations of the Convention in Committee of the Whole, during the three weeks which had elapsed since its organization. It is at once apparent that the Report is in complete accord with the general thought of the Virginia plan. The general scheme for the formation of an actual as well as nominal national government, with its component parts, is retained in its entirety. In six instances the provisions of the "Plan" and of the Report are identical. Many of the changes are simply the filling of blanks in the Plan. There are, however, several important changes, which are worthy of remark.

First. The initial resolution of the Report comes out strongly in favor of the institution of a National Government—not so that of the plan.

Second. The Plan provides that the members of the National Legislature shall be subject to recall. The Report omits this provision.

Third. There is a radical difference between the provisions of the Plan and of the Report as to the manner in which the members of the second branch of the National Legislature shall be chosen.

Fourth. The Report omits the provision of the Plan giving the National Legislature power to use force against a member of the Union failing to do its duty.

Fifth. An important blank in the Plan as to the "unity or plurality" of the National Executive is filled in the Report by a provision for "unity."

Sixth. The veto power given by the Plan to the executive and a part of the judiciary is given by the Report to the executive alone.

Seventh. The Plan provides for supreme and inferior tribunals. The Report for one Supreme Court, with *power* in the National Legislature to appoint inferior tribunals. And it curtails the jurisdiction of the judiciary as set forth in the plan.

Eighth. The Plan provides for a guarantee by the United States of the territory of a State; the Report does not.

Ninth. The Plan provides that the consent of the National Legislature shall not be required to an amendment of the Articles of Union. The Report omits this provision.

Of course the Report is merely the conclusions of the Committee of the Whole, as to the general lines upon which the new government or constitution should be founded. It would not have served as a constitution, and was not suggested as such; in fact much of its language directly points to further action. But even as a general scheme it was utterly abhorrent to certain members of the Convention, and by no means satisfactory to quite a number of them. At the time the Report was presented it was known that a plan on entirely different lines was in preparation; and its consideration was postponed in order that this new plan might be submitted for consideration.

Mr. Patterson, of New Jersey, who submitted the plan, generally known as the "New Jersey" plan, stated at the outset that it was different in principle from the Virginia plan.

The new plan was presented in the form of nine resolutions. I regret the necessity of setting them out *verbatim* ; but only in this way can the debates which followed be made fully intelligible, and a satisfactory comparison of the two "Plans " and the " Report " be made. The New Jersey plan was as follows :

1. *Resolved*, That the Articles of Confederation ought to be so revised, corrected and enlarged, as to render the Federal Constitution adequate to the exigencies of government and the preservation of the Union.

2. *Resolved*, That, in addition to the powers vested in the United States in Congress by the present existing Articles of Confederation, they be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandise of foreign growth or manufacture, imported into any part of the United States ; by stamps on paper, vellum or parchment ; and by a postage on all letters or packages passing through the general postoffice, to be applied to such federal purposes as they shall deem proper and expedient ; to make rules and regulations for the collection thereof, and the same, from time to time, to alter and amend in such manner as they shall think proper ; to pass acts for the regulation of trade and commerce, as well with foreign nations as with each other, provided that all punishments, fines, forfeitures and penalties to be incurred for contravening such acts, rules and regulations, shall be adjudged by the common law judiciaries of the State in which any offence contrary to the true intent and meaning of such acts, rules and regulations shall have been committed or perpetrated, with liberty of commencing in the first instance all suits and prosecutions for that purpose in the superior common law judiciary in such State, subject, nevertheless, for the correction of all errors, both in law and fact, in rendering judgment to an appeal to the judiciary of the United States.

3. *Resolved*, That whenever requisitions shall be necessary, instead of the rule for making requisitions mentioned in the Articles of Confederation, the United States in Congress be authorized to make such requisitions in proportion to the whole number of white and other free citizens and inhabit-

ants, of every age, sex and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes; that, if such requisitions be not complied with in the time specified therein, to direct the collections thereof in the non-complying States [this sentence is faulty, but is thus given in Elliot's Debates], and for that purpose to devise and pass acts directing and authorizing the same; provided, that none of the powers hereby vested in the United States in Congress shall be exercised without the consent of at least — States; and in that proportion, if the number of confederated States should hereafter be increased or diminished.

4. *Resolved*, That the United States in Congress be authorized to elect a Federal Executive, to consist of — persons; to continue in office for the term of — years; to receive punctually, at stated times, a fixed compensation for their services, in which no increase nor diminution shall be made, so as to affect the persons composing the Executive at the time of such increase or diminution; to be paid out of the Federal Treasury; to be incapable of holding any other office or appointment during their term of service, and for — years thereafter; to be ineligible a second time, and removable by Congress, on application by a majority of the Executives of the several States; that the Executives, besides their general authority to execute the federal acts, ought to appoint all federal officers not otherwise provided for, and to direct all military operations; provided, that none of the persons composing the Federal Executive shall, on any occasion, take command of any troop, so as personally to conduct any military enterprise, as general, or in any other capacity.

5. *Resolved*, That a Federal Judiciary be established, to consist of a Supreme Tribunal, the judges of which to be appointed by the Executive, and to hold their offices during good behavior; to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the judiciary so established shall have authority to hear and

determine, in the first instance, on all impeachments of federal officers, and, by way of appeal, in the *dernier resort*, in all cases touching the rights of ambassadors; in all cases of captures from an enemy; in all cases of piracies and felonies on the high seas; in all cases in which foreigners may be interested; in the construction of any treaty or treaties, or which may arise in any of the acts for the regulation of trade, or the collection of the federal revenue: that none of the judiciary shall, during the time they remain in office, be capable of receiving or holding any other office or appointment during the term of their service, or for — thereafter.

6. *Resolved*, That all the Acts of the United States in Congress, made by virtue and in pursuance of the powers hereby, and by the Articles of Confederation, vested in them, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective States, so far forth as those acts or treaties shall relate to the said States or their citizens; and that the judiciary of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding; and that if any State, or any body of men in any State, shall oppose or prevent the carrying into execution such acts or treaties, the Federal Executive shall be authorized to call forth the powers of the confederated States, or so much thereof as may be necessary, to enforce and compel an obedience to such acts, or an observance of such treaties.

7. *Resolved*, That provision be made for the admission of new States into the Union.

8. *Resolved*, That the rule for naturalization ought to be the same in every State.

9. *Resolved*, That a citizen of one State, committing an offence in another State of the Union, shall be deemed guilty of the same offence as if it had been committed by a citizen of the State in which the offence was committed.

The submission of this plan may be said to begin the second period of the Convention's work. It was submitted in Convention on June 15, and an immediate adjournment followed upon the reading of it.

Lucius S. Landreth.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

BILLS AND NOTES.

Following the rule suggested by the United States bankruptcy cases in preference to the English rule on the subject, the Supreme Court of Massachusetts, in *Beals v. Mayher*, 54 N. E. 857, has decided, (1) that where the maker of a note has made an assignment for the benefit of creditors, and the indorser has made a partial payment to the holder, the latter is entitled to prove the full amount of the note before the assignee of the maker, without deducting the amount received by him from the indorser; from which it follows (2) that the indorser cannot compete with the holder before the assignee for the amount paid by him, since to allow him to do so would be to allow a double proof of the same debt.

There is a presumption that the common law of the forum is the law of a sister common law state, but there is no presumption that it prevails all over the world. By analogy the Supreme Court of Massachusetts reasons that while the law merchant may be presumed to be effective throughout Europe, there is no presumption that it is effective in Asia. A charge of court was therefore held proper, to the effect that there was no presumption that the law of protest of negotiable paper was recognized in Harpoot, Turkey, but that the burden was on the party alleging the existence of any certain law there, to prove it: *Aslamian v. Dostumian*, 54 N. E. 845.

CARRIERS.

The defendant railroad company, operating in Iowa, leased a portion of its right of way to an elevator company, the lease stipulating that the defendant should not be liable for fire caused by locomotive sparks, even though the fire was occasioned by the negligence of defendant's servants. The elevator being burned down, the Supreme Court of the United States, on an appeal from the Circuit Court of Appeals, Eighth Circuit, was called upon to decide whether the defendant could law-

CARRIERS (Continued).

fully exempt itself from liability for the negligence of its servants: *Ins. Co. v. Chicago, etc., Rwy. Co.*, 20 Sup. Ct. 33.

The opinion of the court, by Justice Gray, clearly shows that if this had been a case where the general commercial law governed, *i. e.*, a case where the railroad had attempted to limit its liability for a duty which it owed the public, such as the carriage of passengers and freight, the Supreme Court would have declared the stipulation void, irrespective of the decisions of the courts of Iowa. But the case did not involve a question of this sort. The railroad was under no duty to make the lease and there were no principles of public policy which forbade the insertion of such a provision in a private agreement between the railroad and the elevator company. Such being the case, the court was bound to follow the Iowa decisions, as on a mere matter of private property, and, it being clearly shown that such an agreement was lawful in Iowa, the decision of the Circuit Court of Appeals in favor of the railroad was affirmed.

CONFLICT OF LAWS.

The English Court of Appeal has decided an important case in regard to the extent to which an irregularly obtained foreign divorce will be recognized in England: *Pemberton v. Hughes*, [1899] 1 Ch. 781. This was an action by a wife to enforce her marriage right against her alleged husband, to whom she had been married in England. It appeared that she had been married previously in the United States and that her husband was living, but she set up a decree of divorce obtained in Florida, the validity of which was the question in the case. It appeared that, by a rule of the Florida court, ten clear days must elapse between the issue of the subpoena and the return day, and the record of the divorce proceeding showed that only nine days had elapsed. It was alleged that this defect in the service of process prevented the jurisdiction of the Florida court from attaching to the parties, and that there was no objection to the collateral impeachment of the decree in the English court, and this view was adopted by Kekewich, J., in the divisional court.

His decision was reversed by the Court of Appeal (Lindley, M. R., and Vaughan Williams and Rigby, JJ.) and the principle laid down that for international purposes the test of the jurisdiction of a court is not the regularity with which the parties have been summoned before it, but the power which it possesses to summon the parties and to decide the question pre-

CONFLICT OF LAWS (Continued).

sent; that in this case the Florida court possessed undoubted jurisdiction under the latter test; and that the fact that a rule of procedure had been violated was not fatal to the jurisdiction, but was a matter which should have been called to the attention of the Florida court.

The opinion of Lindley, M. R., well repays a reading, but the question arises,—how far does the “power to summon the parties and decide the subject-matter” confer jurisdiction? Suppose in the above case the defendant had never been served. Would the undoubted power of the Florida court to summon her confer jurisdiction? It is to be feared that a general rule deducible from the above opinion might carry the court a little further than it would wish to go.

CONSTITUTIONAL LAW.

Whether the Supreme Court of the United States possesses the power to issue a *mandamus* to a state court to compel obedience to a mandate of the Supreme Court, is an interesting question, and is touched upon, but not decided, in *Ex. Parte Blake*, 20 Sup. Ct. 42. It will be remembered that in the celebrated case of *Blake v. McClung*, 172 U. S. 239, the Supreme Court of the United States declared unconstitutional a Tennessee statute which gave priority to Tennessee creditors of insolvent corporations, and decreed, “that as to the other plaintiffs in error, citizens of Ohio, the judgment must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion; and it is so ordered.” One of the aforesaid citizens of Ohio, not being satisfied with the final disposition of the case by the Supreme Court of Tennessee, applied to the Supreme Court of the United States for a writ of *mandamus* to compel obedience to the above mandate. The Supreme Court of the United States, in an opinion by Fuller, C. J., denied the writ, on the ground that a writ of error was an adequate remedy, but declined to pass upon the abstract question of the power of the court to grant the *mandamus*.

Where counsel intend to appeal from the highest court of a state to the Supreme Court of the United States, it is essential that the constitutional question be presented before the state court. Thus in *Scudder v. Coler*, 20 Sup. Ct. 26, an appeal was taken from the Court of Appeals of New York to the Supreme Court of the United States on the ground that a New York tax was attempted to be levied upon property in New Jersey. In the proceedings before the Court of Appeals

How Soon
the Constitu-
tional Ques-
tion Must be
Raised

CONSTITUTIONAL LAW (Continued).

no mention was made of any constitutional objection to the validity of the tax as affected by the Constitution of the United States, except one objection, which might either have referred to the constitution of New York or that of the United States. The Supreme Court dismissed the writ of error, on the ground that the record did not clearly show that the provision of the Constitution of the United States had been called to the attention of the Court of Appeals.

In *Comm. v. Murphy*, 54 N. E. 860, the appellant had been convicted, sentenced to imprisonment and had served a portion of his sentence in prison, when the law under which he had been sentenced was declared unconstitutional and his case was remanded for sentence in accordance with a former law. The appellant contended that, since his new sentence, together with the time which he had served, would amount to a greater term than his previous sentence, such sentence placed him twice in jeopardy and punished him twice for the same offence, but the Supreme Court of Massachusetts dismissed his appeal.

Twice in
Jeopardy,
Sentenced
Under Con-
stitutional
Act

CONTRACTS.

Ever since the leading case of *Mitchell v. Reynolds*, 1 P. Wms. 181 (1711), the English courts have never opposed technical or unreasonable objections to contracts in restraint of trade, when such contracts are partial either as to time or place, reasonable in their nature, and founded upon a good consideration. The latest case in which such a contract was upheld is *Haynes v. Dornan*, [1899] 2 Ch. 13. Defendant, on entering plaintiff's service, covenanted not to enter the service of any other person or firm within twenty-five miles from the plaintiff's works without plaintiff's consent. The Court of Appeal considered that the contract, while unlimited as to time, was limited as to space, and was, upon the whole, reasonably necessary for the protection of the trade secrets of the employer. An injunction was therefore granted to prevent its violation.

Partial
Restraint
of Trade

In a late case it was held that in an action for rent on a written lease, the defendant may prove that at the time the lease was executed, it was the intention of defendant, and known to the plaintiff, that the premises were to be used for the illegal sale of liquors, and that such sales took place with the knowledge of plaintiff; which defence defeats recovery on the lease: *Mound v. Barker*, 44 Atl. 346

Illegality as
Defence to
a Written
Lease

COPYRIGHT.

A rather interesting case, involving the latest mechanical invention in music, has lately been decided by the Court of Appeal of England: *Boosey v. Whight*, [1899] 1 Ch. 836. Plaintiff possessed the copyright on several popular songs, including "the sole and exclusive liberty of printing or otherwise multiplying copies" thereof. Defendant was a manufacturer of one of the various well known instruments by which a so-called "musical" effect is produced by the machine itself, without any execution on the part of the performer beyond that of regulating the time and tone of the instrument. The question in the case was this: Was the sale of the perforated roll of paper employed in the instrument, with holes corresponding to the various notes, and also containing marks of expression, such as *andante*, *moderato*, etc., to guide the performer, a violation of plaintiff's patent?

It was first contended that a person could become acquainted with the method of the perforation of the rolls and could become so expert that he would be enabled to read the music from the rolls, just as from an ordinary sheet of music. The unlikelihood of any person going to this trouble prevented the point from being seriously considered by the court.

It was then urged that the rolls were copies of a substantial part of what was found in the sheet music, although expressed in a different form of notation, being similar to the relation which a piece of shorthand would bear to the ordinary letterpress. The court, however, decided that the intention of the act was to prohibit only such copies as would appeal to the mind through the eye, and that the rolls were simply parts of the machines and not "copies" any more than the cylinders of music boxes would be. But while refusing to enjoin the sale of the rolls, the court forbade the use of the expression marks to guide the performer, as coming within the copyright.

CORPORATIONS.

The Supreme Court of the United States has again affirmed the general rule that a corporation cannot purchase and hold the stock of a rival corporation, except that it may hold it by way of pledge for the security of an antecedent debt: *De La Vergne, etc., Co. v. Savings Inst.*, 20 Sup. Ct. 20. Nor does the New York Act of June 7, 1853 (C. 333) authorizing such corporations to "purchase mines, manufactories and other property necessary for their business" confer any such power. It is needless to say that the Supreme Court, after

Power to
Purchase
and Hold
Stock of a
Rival Cor-
poration

CORPORATIONS (Continued).

holding the purchase of the stock *ultra vires*, decided that the mere fact that the contract was executed interposed no objection to the right of the defendant corporation to set up the illegality of its own act as a defence to an action on the contract;—citing a long list of decisions beginning with *Pearce v. R. R.*, 21 How. 441. Brewer and McKenna, JJ., dissented, but the grounds of their dissent are not stated.

DEEDS.

Rooms on the second floor of a house, Nos. 13 and 14 Bond street, were rented to plaintiff, together with the free right of ingress and egress "through the staircase and passage of No. 13." It appeared that there was no staircase or passage to the demised premises in No. 13, but there was one in No. 14. The Court of Appeal of England, affirming the decision of Romer, J., [1898] 2 Ch. 551, held that, as there was evidently a common mistake, the doctrine of *falsa demonstratio non nocet* applied, and the lease was rectified by allowing plaintiff a right of way through No. 14: *Cowen v. Truefitt*, [1899] 2 Ch. 309.

EVIDENCE.

The Supreme Court of Pennsylvania has affirmed the now familiar rule that proof that a letter was mailed, properly addressed and stamped, raises a presumption that it was duly received, but that this presumption is rebutted as a matter of law, and should be so declared by the court, when the addressee, whose testimony is uncontradicted, swears that he never received the letter. This rule was applied to the case of the mailing of a notice of reinsurance to an insurance company, where it was held that the rule of notice of dishonor of commercial paper did not apply, but that the burden was on the insured to prove, or to raise a presumption not rebutted by the insurance company, that the notice was actually received: *Packing Co. v. Southern Mut. Ins. Co.*, 44 Atl. 317.

A witness, who testified to a certain fact in direct examination, was asked on cross-examination whether he was not present at a former trial where another witness testified to precisely the opposite, and he (the witness) did not attempt to correct him. The question was excluded. *Held*, no error: *Turner's Appeal*, 44 Atl. (Conn.) 310.

EVIDENCE (Continued).

On the trial of an indictment for selling beer on Sunday, the defence was that the article sold was a non-alcoholic liquor. A witness was permitted to testify that he saw United States revenue stamps on the kegs from which the alleged innocent liquor was drawn. *Held*, no error, as tending to show that the kegs contained malt liquor: *State v. Wright*, 44 Atl. (N. H.), 519.

In an action to try title to land, plaintiff offered in evidence a piece of paper dated the year 1659, and produced from proper custody, which paper purported to be an admission by a former tenant of one of defendant's predecessors in title, that one of plaintiff's predecessors had been persuaded to stop an action against the writer for bringing his cattle on the land, on the payment of sixteen shillings by the writer. *Held*, that the document was admissible, not as an admission by the tenant as to title, in which case it would be inadmissible against his landlord, but as evidence of an act of ownership by the predecessor of the plaintiff: *Jenkins v. Earl of Dunraven*, [1899] 2 Ch. 126.

"Society and the criminal are at war, and capture by surprise, or ambush, or masked battery, is as permissible in one case as in the other." Such is the language used by Justice Mitchell of the Supreme Court of Pennsylvania in holding that a confession was admissible, even though induced by means of a trick, namely a false assurance to the prisoner that a certain knife belonging to him had been found; under the belief of which the prisoner confessed the commission of the crime with which he had been charged: *Comm. v. Cressinger*, 44 Atl. 433.

FRAUD UPON CREDITORS.

It is now well settled in Pennsylvania that where a man conveys his land to his wife by a recorded deed, such conveyance is valid against a creditor whose debt is contracted long after the conveyance, in the absence of affirmative proof that the conveyance was made with intent to defraud the creditor: *Best v. Smith*, 44 Atl. 329. In affirming this familiar rule Dean, J., deemed it important to call attention to certain dicta of Black, C. J., in *Gamber v. Gamber*, 18 Pa. 363, which unexplained, would seem to indicate a contrary view.

HUSBAND AND WIFE.

In *Harrington v. Harrington*, 44 Atl. 522, a suit for divorce, it appeared that at the time of the libel both parties were residents of New Hampshire, but that when the alleged offence was committed the libellant was absent from the state, although the respondent was domiciled in the state and the offence was committed there. After stating two propositions, (1) that the offence must be committed within the jurisdiction of the court granting the divorce (*Martin v. Martin*, 47 N. H., 52), and (2) that the libellant must be domiciled within the jurisdiction at the time, the Supreme Court of New Hampshire goes on to say that if both of these propositions were to be enforced, the present libellant could not obtain a divorce anywhere for that cause; therefore they made an exception to the second proposition and granted the divorce.

Divorce,
Offence Com-
mitted while
Other Party
is Absent
from the
State

Although a husband has the power to dispose of the remains of his wife in any proper manner, yet this is not a property right and will not be permitted to be exercised arbitrarily. Therefore, where the wife was buried in her parents' lot (according to her own previous request) and subsequently the parents bought a lot in another ground, where they, with the knowledge of the husband, prepared a tomb for her at great expense, the husband was enjoined from interfering from the removal of the body to the new ground: *Toppin v. Moriarity*, 44 Atl. (N. J.) 469. The opinion of Steven, V. C., contains a discussion of all the authorities on the subject.

Burial of
Wife, Dis-
cretion of
Husband

The Supreme Court of Massachusetts has decided that in an action by a wife against another woman for the alienation of the husband's affections, it is necessary for the plaintiff to allege and prove actual loss of *consortium*, and that alienation of affections alone is not a substantive cause of action, but merely an aggravation of damages for the loss of *consortium*. Even in an action of criminal conversation the loss of *consortium* must be alleged: *Neville v. Gile*, 54 N. E. 841.

Alienation
of Affections,
Consortium

LANDLORD AND TENANT.

It is well settled that in the absence of an express covenant a landlord is under no liability to repair the premises and does not assume the risk of faulty construction. Therefore the fact that the drains of the premises are so unsuitably constructed and maintained that illness

Defective
Drains,
Liability.

LANDLORD AND TENANT (Continued).

results in the tenant's family, by reason of the foul gas, does not impose any liability upon the landlord: *Towne v. Thompson*, 44 Atl. (N. H.) 493.

MORTGAGES.

The loose language of judges in many cases has led to considerable confusion as to what benefits to the mortgagee may be lawfully stipulated for in a mortgage. Thus in *Santley v. White*, [1899] 2 Ch. 474, the mortgagee of a leasehold stipulated not only for the repayment of the amount advanced, but also for one-third of the profits of the leasehold throughout the continuance of the mortgage. The English Court of Appeal, reversing the decision of Byrne, J., [1899] 1 Ch. 747, held that the stipulation for the payment of the profits was valid, and that the rather vague rule, that the mortgagor's equity cannot be "clogged" or "fettered," did not apply.

MUNICIPAL CORPORATIONS.

The city of Chicago passed an ordinance granting to licensed hackmen certain privileges in choosing the positions in front of railroad stations for their hacks. In a bill filed by a railroad company against the city, to enjoin the enforcement of the ordinance, it was held (1) that the ordinance was unconstitutional as granting exclusive privileges to certain persons of the use of the city streets, which were held by the municipality in trust for the general public and not for the use of special persons, (2) but that an injunction would not issue, since the railroad company had an adequate remedy at law by which damages could be recovered for the injury to their property: *Penna. R. R. Co. v. Chicago*, 54 N. E. (Ill.) 825.

NEGLIGENCE.

The Supreme Court of Pennsylvania has added another case to the long list of those which explain the meaning of the rule that a railroad is responsible to its employees for injuries resulting from the negligent construction of the road. In *Voorhees v. Lake Shore, etc., Rwy.*, 44 Atl. 335, it appeared that there was an ordinary space of some seven feet between the various lines of tracks on defendant's road, but that at one place a switch was

NEGLIGENCE (Continued).

only five and one-half feet distant from a track. The plaintiff, a brakeman on a train coming down the latter track, jumped off on the side toward the switch, in order to turn it, and in doing so was struck by a car on the switch. The plaintiff having testified that he had no knowledge of the especial narrowness of the space between the tracks at that point, it was held that the questions of the defendant's negligence in not providing a sufficient space to work, and of the plaintiff's contributory negligence in jumping down without looking at the switch, were properly left to the jury, and judgment for the plaintiff was affirmed.

The other side of the question presented in the preceding case occurs in *Gillin v. Patten & S. R. Co.*, 44 Atl. 361, where the Supreme Court of Maine held (1) that there is no common law duty imposed upon a railroad to block its frogs and switches to prevent the feet of the workmen from being caught therein; (2) that a brakeman who jumps down upon a switch, without stopping to see whether or not it is blocked, is guilty of contributory negligence, and (3) that the act of 1889, c. 216, requiring railroads to block their switches after January 1, 1890, must be construed so as to allow a road, constructed after 1890, a reasonable time in which to perform its duty, and the statute does not fasten negligence upon such a road which operates trains before it is fully completed and before the switches are blocked.

In Indiana the courts do not apply the "stop, look and listen" rule with absolute strictness, but have adopted a more flexible principle in regard to accidents at grade crossings, namely, that "when a person crossing a railroad track is injured by collision with a train, the fault is *prima facie* his own, and he must show affirmatively that his fault or negligence did not contribute to the injury before he is entitled to recover for such injury." Of course the extent to which the plaintiff must prove the absence of contributory negligence is a mixed question of law and fact, and varies with the peculiar circumstances of each case: *B. & O. Rwy. Co. v. Young*, 54 N. E. (Ind.) 791.

PLEADING AND PRACTICE.

It was provided by the Pennsylvania act of March 17, 1869,

PLEADING AND PRACTICE (Continued).

that attachments under that act should "be made returnable on the first return of said court next after the time of issuing thereof." By the act of 1878, as amended by the act of 1879 (P. L. 125), it was provided that the attachments might be made returnable, "on the first Monday of the next term, or on the second, third or fourth Mondays of any intermediate month." *Held*, by the Supreme Court of Pennsylvania, that the latter act repealed the above section of the act of 1869; therefore it is not necessary to make the attachment returnable to the next return day: *Slingluff v. Sisler*, 44 Atl. 423.

The defendant to a bill in equity may demur on the ground that the cause of action is barred by laches, when said laches is apparent from the face of bill itself, but in an action at law the defendant must plead the statute of limitations specially and may not raise it by demurrer of limitations even though the statement or declaration may show that the cause of action is barred, chiefly on the ground that it is necessary for the plaintiff to have an opportunity to reply that the case is within one of the exceptions to the statute. Such was the rule of the common law, and such is the law of Illinois to-day: *Gunton v. Hughes*, 54 N. E. 895.

REAL PROPERTY.

In *Bonebrake v. Summers*, 44 Atl. 330, the question was presented whether a charge upon land for the maintenance of a person for life was discharged by a sale of the land by an assignee for the benefit of creditors under the Pennsylvania act of February 17, 1876.

The Supreme Court of Pennsylvania decided, (1) that the act of 1876 must receive a construction similar to that of the act of April 6, 1830, in regard to judicial sales, and that those liens, and those only, which would be discharged by a judicial sale, would be discharged by a sale under the act of 1876; (2) that a charge for the maintenance of a person, being of uncertain duration and incapable of being valued exactly, would not be discharged by the judicial sale, therefore the lien in question was not discharged by the assignee's sale.

The latest case where the rule in Shelley's case was rigorously applied by the Supreme Court of Pennsylvania was

Reimer v. Reimer, 44 Atl. 316, where a devise to A. for life with remainder over "if she leaves no

REAL PROPERTY (Continued).

heirs," was held to vest a fee in A. Considering that A. was the daughter of the testator and that the remaindermen included all her brothers and sisters, it seems pretty evident that the word "heirs" was used to designate A.'s children, but the Supreme Court refused to look at it in that light.

SALES.

Perhaps it is difficult in Pennsylvania to formulate any reliable rule which will make a clear distinction between conditional sales and bailments with options to purchase, but there are a few essential elements of a valid bailment which attorneys will do well to remember.

In *Morgan Electric Company v. Brown*, 44 Atl. 459, the agreement was in the usual form, the so-called "rent" being secured by succession notes and the transaction being carefully designated as a "lease," etc.; but one feature was altogether lacking:—a provision for the return of the article at the termination of the agreement. Chiefly on this ground the transaction was held to constitute a conditional sale—citing *Farquahar v. McAlevy*, 142 Pa. 233—and the provision contained in the agreement that, upon the payment of the last of the notes, the bailor should make a bill of sale to the bailee was considered to be a mere euphemism for saying that, upon that contingency, the title of the vendee should become absolute.

SURVIVAL OF ACTIONS.

It seems remarkable that some judges in Pennsylvania have not yet mastered the distinction between the natures of the actions for negligence which survive under the eighteenth and nineteenth sections, respectively, of the act of April 15, 1851. Two long lines of cases have conclusively established (1) that when the administrator of the deceased continues the action under the eighteenth section, the measure of damages is precisely that which would govern the action by the deceased, if alive, viz., damages for pain and suffering, necessary expenses and loss of earning power during his probable period of life, and (2) that where the action is brought under the nineteenth section (by the person designated by the explanatory act of April 26, 1855), the amount recoverable is limited to the pecuniary loss suffered by the plaintiff, (3) and that in no possible instance may both classes of damages be recovered. Yet in *McCafferty v. Penna. R. Co.*, 44 Atl. (Pa.) 435, the trial judge

**Actions for
Negligence
Resulting in
Death,
Damages**

SURVIVAL OF ACTIONS (Continued).

instructed the jury that the mother of the deceased (who was continuing, as administrator, an action commenced by the deceased in his lifetime) could recover for her pecuniary loss. As a matter of course, judgment for the plaintiff was reversed.

WILLS.

Testator by his will directed the residuary legatee to pay to each of testator's three daughters \$150 in case she married within eight years, or \$500 if she remained unmarried at the expiration of that time. Then followed the clause, "It is my will that if either of my daughters should decease, leaving no heirs, that their legacy above named should be divided among such of them as should survive." It having been agreed that the word "heirs" should be construed as "children," the Supreme Court of Vermont held that it was the evident intention of the testator that the conditional limitation to the surviving daughters was to take effect only upon the death of one of them within the eight years, and that there was no foundation for the contention that a life estate was created in the \$500 with remainder over upon the holder dying childless: *Andrews v. Sargent*, 44 Atl. 341.

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DAMAGES; BREACH OF CONTRACT; MENTAL SUFFERING. *McBride v. Telephone Co.*, 96 Fed. 81 (1899). The complaint in this action for damages stated that while the complainant was away from home his daughter fell ill and the family were in need of a remittance of money. His son, acting as his agent, thereupon sent him a telephone message, stating the facts, and asking him to return as soon as possible. The message was never transmitted, and in consequence, the complaint further alleged, the plaintiff remained ignorant of his child's illness until after her death. Because of his apparent neglect his wife and children became estranged, his home was broken

up and he suffered great mental anguish and distress. There was a demurrer to the complaint, which, by agreement, was argued and submitted for the purpose of testing the question of the proper measure of damages.

The rule laid down in *Hadley v. Baxendale*, 9 Exch. 354 (1854), the leading case on this subject, for the measure of damages in actions on contract is as follows: "The damages which one party to a contract ought to recover for breach of it by the other are such as either arise naturally from the breach itself, or such as may reasonably be supposed to have been in the contemplation of the parties, when making the contract, as the probable result of the breach. Any other claims for damages are regarded as too remote. And the same rule applies, *mutatis mutandis*, to actions sounding in tort." Anson, in his valuable work on contracts, *309, fully agrees with this view.

Hanford, the District Judge in the case under discussion, although he cites no authorities in his opinion, seems to follow *Hadley v. Baxendale* when he says: "The failure to transmit the message is not the direct or the proximate cause of the disruption of the plaintiff's family." Nor was it the direct or the proximate cause of the daughter's death, as in *Telegraph Co. v. Stephens*, 2 Tex. Civ. App. 429, 21 S. W. 148 (1893), where a physician was summoned by telegraph and his arrival delayed until the child died. It was shown at the trial, or at least intimated strongly, that had the physician received the message, and so arrived in time, the child would have been saved. In that case damages were even allowed "for the superadded pain and anguish caused to the parents by seeing their child die without relief."

Judge Hanford then went on to say that even if the plaintiff's trouble was the direct and proximate result of the defendant's negligence, yet the plaintiff could not recover, for such could not be the natural result of a breach of the contract within the contemplation of the parties. He thus again impliedly followed *Hadley v. Baxendale*.

The rule seems to be well settled that damages for "nervous or mental shock" are too remote. See Webb's Pollock on Torts, page 54, and the cases there cited. In a few of the States, notably North Carolina, Tennessee, Texas and Indiana, the courts have essayed to compensate in money the grief or regret of the addressee of a telegraphic message negligently delivered too late to permit to attend on the bedside of the ill or the obsequies of the dead, although he has suffered no pecuniary loss or bodily injury. See *Young v. Tel. Co.* 107 N. C. 370 (1890), 11 S. E. 1044; *Wadsworth v. W. U. Tel. Co.*, 86 Tenn. 695 (1888); *Chapman v. W. U. Tel. Co.*, 13 S. W. 880 (1890), and *Reese v. W. U. Tel. Co.*, 123 Ind. 294 (1889). So *Relle v. Tel. Co.*, 55 Tex. 308 (1881), is the first and leading case on this side; it has been followed, with slight modifications, in all the later Texas cases. The contrary is certainly the sounder doctrine. In *Chapman v. W. U. Tel. Co.*, 88 Ga. 763, 15 S. W.

901 (1892), and *Tel. Co. v. Rogers*, 68 Miss. 748, 9 So. 823 (1891), the authorities on both sides of the question are reviewed and the right of recovery denied. Judge Thompson has an able article on this subject in 33 Cent. Law Jour. 5 (1891). The notes to *Rwy. Co. v. Caulfield*, 11 C. C. A. 571 (1894); *Tel. Co. v. Coggin*, 15 C. C. A. 250 (1895), and *Tel. Co. v. Morris*, 28 C. C. A. 62 (1897), contain much that is of value on this important subject.

We have no doubt of the correctness of Judge Hanford's decision. The rules that apply to telegraph companies would certainly apply to telephone companies, but we would have enjoyed the learned judge's opinion more had he cited a few, at least, of the many valuable authorities on this point.

To some this case may seem hard, but "hard cases make bad law." In this connection we can do no better than refer to Judge Hanford's words: "If he (the plaintiff) is a kind and dutiful father and husband, the refusal on the part of his wife and children to accept a reasonable explanation of his apparent neglect proves conclusively such perversity and unlovely dispositions in them that the distress and humiliation and loss which the plaintiff alleges he has suffered must be attributed to their unreasonable behavior, rather than to the defendant's breach of his contract."

INJUNCTION; ENFORCEMENT OF AN AGREEMENT NOT TO ENGAGE IN BUSINESS.—The case of *Cook et al. v. Brisebois, Rapports Judiciaires de Quebec*, vol. xvi, page 46 (decided in May last), sheds new light upon the powers of a court of equity to enforce a negative covenant. *Cook et al.* filed a bill in equity to have the defendant, Brisebois, enjoined from continuing in the business of tallow-rendering in the city of Montreal. Brisebois sold his tallow-rendering establishment in Montreal to the complainants. In the agreement of sale there was the following condition: "It is also understood and agreed that Mr. Brisebois will do all he can to turn over his trade to Hughs, Cook & Co., and engages himself not to enter the business again at any time or help any one toward doing so." Soon after, the defendant was actively engaged in the formation of another company; he solicited orders and was well known in his connection with it. But he never held any interest in the company, being employed by it at a weekly salary. The court granted the injunction, restraining the defendant from carrying on or being engaged in the business within the district of Montreal.

Looking at the terms of the contract, it appears to be an agreement in restraint of trade unlimited as to space or time. Such a contract is void, under the most extreme cases. No case has gone further than *Nordenfeldt v. Maxim*, L. R. Ap. Cas. 535 (1894), and in that case the time was limited to twenty-five

years. But in those cases, there has been a reason which does not extend to the present. In all of them, the court has decided that the restraint thus sought to be imposed was necessary and reasonable for the protection of the purchaser in the enjoyment of the article purchased. *Underwood v. Barker*, L. R., 1 Ch. D. 301 (1899); *Robinson v. Heuer*, L. R. 2 Ch. D. 456 (1898).

Of course, if the court has the right to limit the application of the agreement to the district of Montreal, their restraint does not violate this rule of English law. But we have been able to find no English case which allows the court to limit the scope of the contract, as to space and time, according to any presumed intent of the parties. It is true that the English and American courts have held that a contract which is severable—if a part of it be a reasonable restraint—can be enforced to that extent. If this contract had been not to carry on the business in the district of Montreal or elsewhere, the decree granting the injunction, would have been unexceptionable: *Underwood v. Barker*, (supra); *Trenton Potteries Co., v. Oliphant* (N. J.) 39 Atl. Rep. 923 (1898). In the first case, just mentioned, Lord Justice Lindley said: "An agreement in restraint of trade, which is wider than is reasonably necessary for the protection of the person seeking to enforce it, is invalid so far as it is wider than is so necessary, and this may invalidate the whole restraint sought to be imposed, if the clause imposing it is so framed as not to be severable." It would be impossible for the court to justify its decree upon the ground that this contract is divisible, nor does it attempt to do so.

The strongest argument in favor of the decree is to be found in the case of *Avery v. Langford*, Kay 663 (1854). The court, in the case under discussion, says that they are warranted, upon the authority of *Avery v. Langford*, in limiting the injunction according to the nature of the business. But in that case the restraint as to space and time was admitted to be reasonable, and the only thing the court did allow the character of the business to affect was the meaning of the ambiguous expression "not to set up a trading establishment." It was the same kind of a question that came before the court in *Perls v. Saalfeld*, L. R. 2 Ch. D. 149 (1892), when the court endorsed the doctrine laid down in *Avery v. Langford*.

Opposed to the decree in *Cook et al v. Brisebois* is the authority of *Ward v. Byrnes*, (5 M. and W. 547, 1839), which was taken notice of and distinguished in *Underwood v. Barker*. There an agreement by the defendant not to engage in the coal business for nine months after the termination of his service with the complainants was held void as imposing a restraint beyond what was reasonable—being unlimited as to space. This case and the present one are flatly upon the same ground. There is an American case, decided in the Circuit Court of the United States, which more nearly supports the case in issue than any English authority: *Hitchcock v. Anthony*, 83 Fed. R. 779 (1897). There an agreement not to sell fish or "do any-

thing that will conflict with said coal or fish business of the said Anthony," was held valid, and limited in its application to the area covered by the plaintiff's business. There are, however, marked points of distinction between the two cases.

In the light of this last case, the decision of the Circuit Court in a case like the present might be in favor of an injunction. As for the English courts—while they have been steadily breaking away from many points of the common law doctrine—in the light of the words of Lord Justice Lindley, and the unreversed case of *Ward v. Byrnes*, we think they would have refused to grant the injunction in this case.

DOWER: EFFECT OF RE-MARRIAGE ON WIDOW'S RIGHT.—The case of Brown's appeal, 44 Atl. Rep. 22, (1899), is an interesting résumé of the effect of divorce on a widow's right of dower. The appellant claimed dower in her deceased husband's estate under the following facts: Lucius D. Brown had been divorced from the appellant (she being the innocent party) and both subsequently married. The second wife of the decedent was still living and also the second husband of the appellant. When the decree of divorce was granted the appellant had not received any provision by way of jointure, had entered into no agreement with the decedent in respect of her property rights, received no alimony, nor had she in any way forfeited her right of dower if such right exists under such circumstances. The property in which the appellant claimed dower was acquired subsequent to the decedent's second marriage. Judge Hamersley, in delivering the opinion of the court, reviews the law of marriage, divorce, land, descent and distribution as it existed in Connecticut from the settlement of the State down to the present time; but the decision, however, rests upon a recent statute which provides that "where a wife is absent from a husband with his consent, or through his mere default, . . . in case of divorce, where she is the innocent party, if no provision has been made for her, after the death of the husband, she shall be entitled to have dower in his lands." "But," the court said, "It is certain that a woman divorced is admitted to dower only because she represents, and no other is, the wife living with her husband, or separated through his fault. In this case the much-married man has left a widow, and, under the statute she, and no other, is entitled to dower."

This case is unique and raises some nice questions for discussion. The general rule in this country is that where there is a divorce a *vinculo matrimonii* the dower right of the divorced woman is barred absolutely whether she be innocent or not, or whether the husband has re-married or not. When the divorce is a *mensa et thoro* the majority of courts hold that the right to dower is not barred.

In the case under discussion the court cited the case of *Stilson v. Stilson*, 46 Conn. 15, (1878), where it was held that a divorced wife has dower right in her husband's estate provided he has not re-married, since she is then his widow although living apart from him through his fault. Her right of dower, the court said, "is precisely the same as that of a woman living with her husband at the time of his death."

There seems to be no question but that a wife's dower right is barred when she is in fault and a divorce "*a vinculo*" is granted. Also her right may be barred by her adultery and elopement but under some statutes elopement is necessary in order to bar her right. In *Cogswell v. Tibbetts*, 3 N. H. 41 (1824), it was said: "It is very clear under this statute there could be no forfeiture without what is denominated an elopement. And to constitute an elopement, the wife must not only leave the husband, but go beyond his actual control. For if she abandon the husband, and goes and lives in adultery, in a house belonging to him, it is said not to be an elopement."

In *Thayer v. Thayer*, 14 Vt. 107 (1842), the court said, "That the widow is barred of any claim, by reason of her having left her husband before his death, cannot be sustained. The evidence tends to show that the separation was, in the end, by the mutual consent of husband and wife. Be this as it may, there is nothing in the evidence that can bar the widow's right of dower, or her right to a distributory share. Though the wife might have been indiscreet, and have left the husband without a justifiable cause, still this would not work a forfeiture of her rights."

There seems to be a conflict in the decisions with regard to whether the husband re-marry or not. Some courts hold that a wife, though divorced, is still the wife for the purpose of receiving dower as long as he has taken no other wife to fill her place. This, we think, is a distinction which ought not to be made. If the husband is in fault, the court should at the time of the granting of the decree of divorce make him provide for his injured wife and not allow her to wait until after his decease to put in a claim for dower, when it will, necessarily, be much more difficult to ascertain who was really in fault. Such a doctrine, if adopted, would render the interpretation of statutes on the subject of dower uniform and put an end to useless suits. With regard to any property which the husband may acquire after the divorce, she can have no claim to and could not, reasonably, expect to get dower. When the divorce was granted it was at her request, she then received alimony in lieu of dower, and should rest content with a reasonable settlement out of the then estate of her husband. In *Miltimore v. Miltimore*, 40 Pa. 151 (1861), it was held that where a divorce "*a vinculo*" had been granted at the request of the wife, although the granting was irregular, she was, nevertheless, estopped from claiming dower by setting up the irregularity.

Where the decree of divorce is merely "*a mensa et thoro*" the wife's right to dower is not barred even though the divorce was granted at her request. In *Amer. Legion of Honor v. Smith*, 45 N. J. Eq. 466 (1889), the court said, "The decree of divorce *a mensa et thoro* did not dissolve their marriage bond. Though separated by the decree from his bed and board, Hannah still remained the wife of Henry Smith, and retained all the property rights incident to that relation to him, and on his death she became his widow, and as such succeeded to all the rights in his property which the law gives a widow in the property of her husband on his death. The only effect of such divorce, where common law prevails, is to compel them to live apart, and to deprive the husband of his control over his wife."

In conclusion it may be said that, generally, where a divorce *a vinculo matrimonii* has been granted, the wife loses all property rights in the estate of her husband; if the divorce is only from bed and board the property rights are not affected. This seems the most rational rule and the one calculated to avoid useless litigation.

CRIMINAL LAW: REVERSAL OF SENTENCE; DOUBLE JEOPARDY.—In the case of *Commonwealth v. Murphy*, 54 N. E. 860, (1899), the defendant appealed to the Supreme Court of Massachusetts from a sentence passed on him by the Superior Court of that State, claiming that he was by it placed a second time in "jeopardy of life and limb." His contention was based on the following state of facts: The crime of which he was convicted was made statutory by an Act subsequent in time to the commission of the crime itself. He was indicted, found guilty and sentenced in accordance with the provisions of the Act. It was subsequently held that the statute under which he was sentenced was unconstitutional so far as it related to past offences. On an appeal brought by the prisoner his sentence was reversed, and he was remanded to the Superior Court for sentence according to the law as it was when the offence was committed. He, meanwhile, served two and one-half years of his original sentence, and this time, together with the period of the second sentence, amounted a greater time than that of his first sentence.

He appealed from the second sentence, contending that by it he was placed twice in jeopardy, and deprived of his constitutional rights. The Supreme Court of Massachusetts, however, held that, since he was not to be placed on trial a second time, he would not be put twice in jeopardy, and that, "though the effect of the re-sentence will be to compel the defendant to suffer solitary confinement twice, and will result in his actual confinement for a longer period than the term for which he was originally sentenced, we do not see . . . that the last sentence is rendered invalid thereby."

Blackstone says it is a "universal maxim of the com-

mon law of England that no man is to be brought into jeopardy of his life more than once for the same offence," (Bl. Com. IV, 335), and this extends to all offences, capital or otherwise. The principles of law reached in the various jurisdictions from this maxim as a basis are very nearly in accord. When a person has been, in due form of law, tried upon a good and sufficient indictment, and convicted or acquitted, that, conviction or acquittal may be pleaded in bar to a subsequent prosecution, within the same jurisdiction, for the same offence: May. Crim. Law, 117. And even if the indictment be insufficient and the proceedings be irregular, so that a judgment thereon might be set aside upon proper process, yet if the sentence thereunder has been acquiesced in by and executed upon the convict, such illegal and voidable judgment constitutes a good plea in bar. *Com. v. Loud*, 3 Met. 328 (1841). But where the prisoner himself seeks to have the sentence reversed, as where he is convicted by a misdirection of the judge on point of law, or by misconduct on the part of the jury, in such case if he has the verdict set aside, he may again be sent to the bar. *Reg. v. Deane*, 5 Cox, C. C. 501 (1851); *Com. v. Green*, 17 Mass. 515 (1822).

So in the case in point, the prisoner himself sought to have the original sentence reversed, and could therefore be lawfully re-sentenced.

In New York the case of *McKee v. The People*, 32 N. Y. 245 (1865), held that a person is said to be put in jeopardy only when he is tried a second time upon a criminal accusation, but that the term has no relation to the reversal of the erroneous judgment and pronouncing a legal one, pursuant to a legal conviction. In England, *Reg. v. Drury*, 3 Car & K. 193 (1849), holds that a judgment and sentence reversed are the same as if there had been no judgment and sentence, and this must be so even if the prisoner has served part of the sentence. See, also, *Rex v. Bourne*, 7 Adol. & E. 58 (1837); *Rex v. Ellis*, 5 Barn. & C. 395 (1826).

The Pennsylvania courts, and the majority of the tribunals in the United States, hold with *Reg. v. Drury* that it would be shocking to both "justice and common sense that individuals, who object only that they have been regularly found guilty of an offence on a lawful trial, but that there has been a mistake in the judgment pronounced, which judgment has on that ground been reversed, and can never be carried into effect, should therefore remain exempt from all punishment."

"&c."

Each of the Judges of the Orphans' Court of the County of Philadelphia has a task like that of Sisyphus, who rolled the stone to the top of the hill only to find that it always returned to the bottom. Each first Monday of the month in term time

finds the audit list, with its bulk of accounts, just as insistent as was its like four weeks before. In addition to this "endless chain" there are the demands of the motion and argument lists. It is strange that one who is so occupied can find time or take pleasure in legal study not immediately "*pro re nata*" in the actual business of the Court. It is, however, to the learning and kindness of a member of that bench, whose scholarship never grows weary, that the writer is indebted for some instances of the use of the above abbreviation. Inapt and unmeaning as it may seem, when the supposed precision of legal expression is considered, it is woven into the text of a great writer and into the most familiar forms of pleading.

Notably and deliciously quaint is this from Coke on Littleton:

"OF FEE SIMPLE."

17 b "'*In such manuell occupation, &c.*' There is nothing in our author but is worthy of observation. Here is the first (&c.) and there is no (&c.) in all his three bookes (there being as you shall perceive very many), but it is for two purposes. First, it doth imply some other necessary matter. Secondly, that the student may, together with that which our author has said, inquire what authorities there be in law that will treat of that matter, which will work three notable effects; first, it will make him understand our author the better: secondly, it will exceedingly adde to the reader's invention: and lastly, it will fasten the matter more surely in his memory; for which purpose I have for his ease in the beginning set downe, in these Institutes, the effect of some of the principal authorities in law, as I conceive them concerning the same."

Again :

140 b "'*Because of his younger age, may least of all his brethren helpe himselfe, &c.*' Here by (&c.) are implied those causes wherefore a youth is lesse able to ayd himselfe, &c. which the poet briefly and pithily expresseth thus :

"Imberbis juvenis, tandem custode remoto,
 "Gaudet equis, canibusque, et aprici gramine campi,
 "Cereus in vitium flecti, monitoribus asper,
 "Utilium tardus provisor prodigus aeris,
 "Sublimis, cupidusque, et amata relinquere pernix.
 "And againe, no living creature more infirme than man:
 "Nil homine infirmum tellus animalia nutrit
 "Inter cuncta magis.—"

How many practitioners in drawing petitions have inquired the meaning of the "&c." in the oft-written conclusion "And your petitioner will ever pray, &c."? Doubtless every one has

deemed it an invocation of blessing on the Court, but it is interesting to note some examples of the ancient phraseology. The abbreviation, however, has been employed for many years—for centuries indeed.

In "Cursus Cancellariae," or the Course of Proceedings in the High Court of Chancery, London 1715, the modern form is given v. p. 69, 330, 331, "And your petitioner shall ever pray, &c."

In the preface to "Aeta Cancellariae," or Selections from the Records of the Court of Chancery, London, 1847, the author, Cecil Munro, one of the Registrars of the Court, states that the papers contained in the volume "have been extracted, with one exception, from documents remaining as of record in the Report office of the Court of Chancery; where they have lain probably untouched for considerably more than two centuries." A petition of Sir William Wogan, Knight, in Barlow *vs.* Wogan (M. T. 1611) is given on p. 156, praying the Lord Chancellor to grant the petitioner "ease of this, his punishment." It ends with the familiar "and he shall daily pray, &c." and there are like instances of the use of this form. There are, however, several cases of the extended form of this prayer. Thus on p. 267 (1619) "And your petitioner as in duty bound shall daily pray for your Lordship's long life." On p. 294 (1620) "Shall ever pray for your Honor." On p. 270 (1619) . . . "for which your petitioner will ever pray for your Lordships endless happiness."

An amazing compilation is to be found in "Calendars in Chancery of Queen Elizabeth," printed by order of the record commissioners. Prefixed to the calendar is a selection of bills and petitions of dates anterior to Queen Elizabeth's reign. In the appendix to that "excellent little book," "Haynes Outlines of Equity" (288) there is a bill, taken from the Calendars in Chancery, which shows in full what the subsequent "&c." meant; *i. e.*, in substance, for the prayers of benison at the end of ancient petitions in equity varied in phrase. These words appear, *inter alia*, "And she shall pray God for yo^r"—Vol. 1, p. Xli (Reign of Henry VI). On the same page "And yo^r said pore orato^rs shall ev^r p^ry to God for yo^r good Lordship."—"said suppl^r shall according to his bounden duty, daily pray to Almighty God for y^r p^rservacon of y^r h^h health long to continue." 1595—Id. CXliv (Reign of Elizabeth).

Illustrations might be multiplied, *e. g.*, Thomas *vs.* Pierce, 1 Chester Co. Rep. 403, which explains the expressions "when, &c.," and "under which, &c.," in the ordinary forms of avowry and cognizance of rent in arrear in actions of replevin, but the foregoing are sufficient as a matter of interest.

J. W. P.

BOOK REVIEWS.

JOHN SELDEN AND HIS TABLE-TALK. By ROBERT WATERS.
New York: Eaton & Mains, 1899.

John Selden—the famous contemporary of Ben Jonson and Sir Francis Bacon—needs no introduction to our readers; but it gives us great pleasure to recommend to their attention this pleasing edition of his famous table-talk. It would be a waste of time to speak of the wit, the charm and the sound wisdom of those familiar discourses after they have been so highly spoken of by such eminent critics as Coleridge and Hallam. The editor has heightened their interest and strengthened the allusions by the insertion of apt notes. The work also contains an account of famous bygone table-talks, the career of John Selden, and a chapter telling of the origin of Selden's table-talk, and its popularity.

E. W. K.

BIRDSEYE'S ABBOTT'S CLERKS' AND CONVEYANCERS' ASSISTANT. By C. F. BIRDSEYE. New York: Baker, Vorhis & Co., 1899.

The original edition of this work, by Austin and Benjamin V. Abbott, has been so long before the profession, and has always been so favorably regarded, that it scarcely needs any new commendation at this late day. In preparing the present edition Mr. Birdseye has retained as many of the old forms as are not obsolete and has added new ones, which almost double the size and consequently the value of the book. The 1,500 forms which the book embraces range from the simpler kinds of contracts to the most intricate corporate agreements, such as Railroad Leases, Railroad Mortgages, Car Trust Agreements. The index, too, is an exceedingly comprehensive one, in that it covers not only the titles to the forms, but their more important covenants and agreements as well. No lawyer can afford to be without it.

O. S.

A TREATISE ON THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES, BANK NOTES AND CHEQUES. By the Right Honorable Sir JOHN BARNARD BYLES. Sixteenth Edition. Edited by Maurice Barnard Byles and Walter John Barnard Byles. London: Sweet & Maxwell, Limited, 1899.

A work which has passed through sixteen English and eight American editions in seventy years needs no word of comment

upon its established usefulness to student and practitioner. Chief Justice Sharswood has well said in the prefaces to his American editions: "This treatise has won its way so entirely into public confidence as an accurate and practical compendium of the Law of Bills of Exchange and Promissory Notes, as evidenced by the demand constantly recurring for new editions both in England and this country, that nothing further need be said in its favor."

In his preface to the First Edition (1829) the author expressed the purpose of his "little book" to be to "supply a want, felt by many, of a plain and brief summary of the principal practical points relating to bills and notes, supported by a reference to the leading or latest authorities." Subsequent cases and statutes have been included in the later editions, and the authorities on the subject are so numerous that it has always been the difficulty of the editors to avoid destroying the symmetry and usefulness of the book by crowded references. These editions have each been successful, and Byles on Bills is more extensively cited than any other work on that subject, and is preeminently the leading authority on Bills and Notes. The crystallization of the law relating to the vexed topics treated in this work into such a small compass has excited both the wonder and admiration of the profession and the courts in this country and in England.

In the Sixteenth London Edition is still preserved that same succinctness of text and judicious selection of leading points and cases so remarkable in the First Edition. The arrangement, however, of the latest edition, is somewhat changed. The more recent editions follow the chronological order: the first ten chapters are devoted to a description of the instrument, the next two to the title of the holder, the following six to his duties, and the remaining seven to his rights, how they may be lost or qualified, or enforced by action or proof in bankruptcy. The American Editions (the Eighth, appearing (1891) have so far followed the older arrangement. It is to be hoped that a new American edition will soon be forthcoming, including the more recent statutes and cases.

The work includes, as some of the earlier editions have done, an appendix containing all the English statutes in force upon the subject of Bills and Notes. In 1882 there came into force the "Act to Codify the Law relating to Bills of Exchange, Cheques and Promissory Notes" (45 and 46 Vict. c. 61). This appears among the other statutes. This Act is constantly referred to in the text as "The Code," and the present Sixteenth Edition contains an Index showing the "Sections of Code, where referred to in Text,"—of the greatest value to the English attorney.

An edition so carefully prepared will serve to sustain and strengthen the reputation which Byles on Bills has established as a standard work, and we commend it for its accuracy

and compendiousness to every student of law, and as a work without which the library of every legal and business man is necessarily incomplete.

J. S. K.

PRINCIPLES OF PLEADING. By JAMES GOULD, LL. D.
Edited by FRANKLIN FISKE HEARD. Fifth Edition. New
York: Banks & Brothers, 1892.

An old friend is none the less welcome because he wears a new dress, and we are well pleased to see that Mr. Justice Gould's book has been receiving the attention it so richly merits. It has been so long before the public and is so well known to the profession that we shall say nothing of its general features. To the student we say that it is a conscientious and comprehensive work, than which few can be found better adapted to his requirements.

The present edition is the fifth since the book was originally published in 1832, but we see that the editor, Mr. Heard, has been both wise and reverent enough to preserve the text intact, placing his additional comments and remarks in the last pages of the book. It speaks well for the original value of the work, that after the lapse of such a period of time so little addition was necessary to modernize it. Mr. Heard has given us only seventy pages of addenda in a book of nearly six hundred, but apparently they are amply sufficient. Mr. Gould's work has now received what alone it needed—the attention of a careful and competent man in bringing it up-to-date—and there is no reason why it should not now be as valuable to the law-students of the present generation as it has been to those of the past.

P. M. R.

A TREATISE ON CRIMINAL PLEADING AND PRACTICE. By
JOSEPH HENRY BEALE, JR., Professor of Law in Harvard
University. Boston: Little, Brown & Co., 1899.

In this work, which appears in the Student's Series, Professor Beale has made a contribution to legal literature valuable alike to the practicing lawyer and the student, and has demonstrated that it is possible in the compass of four hundred pages to treat fully and luminously of the principles of an important legal topic.

The work is divided into four parts. Part I deals with Matters Before Trial, Part II with the Accusation, Part III the Trial, and Part IV with Matters of the Trial, Arrest of Judgment, Appeal, Sentence, etc.

Heretofore students and lawyers have been obliged to make their choice between "handbooks" containing mere bald and

unconnected statements of well known principles, which did little more than put the lawyer "on the track" of what he was seeking, through the medium of citations in the foot-notes and cumbersome works which, however useful to the lawyer, were impossible to the young student engaged in covering the whole field of law. Mr. Beale presents the *via media*, and offers to the lawyer a work which contains practically all that is of value to him in the larger works on the subject, and to the student a text-book which is a marvel of lucidity.

W. E. M.

THE EXECUTIVE POWER IN THE UNITED STATES: A Study in Constitutional Law. By M. ADOLPHE DE CHAMBRUN. Paris: Thorin & Sons. 1896. (Written in French).

Among the many books which deal with the questions arising under the Constitution of the United States, one of special interest is M. de Chambrun's treatise on the Executive Power. As the author's name imports, he was a Frenchman and attached to the French Embassy as its legal adviser. Before writing his book he had been in America for seven years, and had become a member of the bar in Washington. M. de Chambrun was, therefore, well qualified to handle the subject on which he has written. The author's purpose in penning his book is thus set forth by his son in his preface to the second edition: "My father, who . . . was intimately associated with several men whose parts in the political crisis of the period of Secession had been considerable, commenced to write this volume about 1872, when the third Republic was being established in France. A correspondence carried on with M. Thiers had made him consider the utility which would perhaps exist in explaining to the French public the theory of the American executive power, at a time when the presidential power, such as it was among us, was about to make its first appearance. He did not desire the French constitution to imitate exactly that of the American Union—according to him certain inherent factors in the political and social conditions were opposed to it—but he desired, if possible, to familiarize the French public with the liberal parliamentary theories of which he was always a pronounced partisan, even though at that time family traditions made him still hope for the return for our ancient hereditary monarchy."

It is of course impossible here to give even the briefest synopsis of M. de Chambrun's book. Suffice it to say that he has shown himself a very well informed, intelligent and kindly critic of our governmental system. It is a pity that no translation is available for readers in this country, as his work is most thoughtful and instructive and should be read with care not only by lawyers, public men and students, but also by those who have our national welfare at heart. The book is far from

tedious, though of course some elementary matters have been introduced to make it understood by a foreign audience. Its style is plain and its reasoning easily followed.

In view of the present position of our country the following quotation will furnish food for thought. The extract is made from the last chapter entitled "Causes which might modify the Constitution of the United States," and is as follows: "We have seen elsewhere in what way President Washington was made the faithful interpreter of the thought of the members of the Constitutional assembly at Philadelphia. The administration which he organized proposed to avoid, as much as possible, foreign complications. We have read in another chapter of this book how, upon retiring from power, Washington insisted upon the continuance of his policy of neutrality. It is because his successors have not deviated from it that the republic has been maintained. An active and energetic foreign policy presumes in effect in the executive power which directs it, both permanence and a force proportional to the vigor of the action. At the same time the alliances formed with other powers have only value, as far as they are supported by a display of strength; in other words, they cannot be brought about without armies and navies strongly organized. If then the spirit of conquest and the lust for new territorial acquisitions should develop itself in the United States, they would soon bring about an inevitable augmentation in the powers of the President. At this point let us glance at the map of North America; we see that the United States could expand themselves either by annexing Canada or by making a conquest of Mexico, or finally by attaching to the Union the Greater and the Lesser Antilles. The populations of Canada are almost like those which make part of the republic; almost all speak the English language, and are accustomed to the practice of a free government. Should they become part of the Union that they could mould themselves easily to its institutions is certain. But it would certainly not be the same in the case of the Mexicans or of the men of the so greatly-diverse races which are established in the Antilles. The day on which the United States annex these countries they will be obliged to govern them; they must provide for the needs of these populations: in a word, establish among them a great public service. Then they themselves will enter upon an entirely new way; the national government will take up a preponderating importance, and the Executive Power will be led to interfere constantly and in a most vigorous manner in the affairs of the annexed territories. The day on which its attributes will be thus extended, the American Constitution will have submitted to such a transformation that it will no longer be what we see it now (1873). There will have been developed in the United States a very strong government, much more like that which Hamilton wished to create than that which was evolved from the deliberations at Philadelphia. If then the sovereignty of the people should cease to be exercised as it has

been for more than eighty years, and if the organization of the States should lose its existing vigor, the central government, and especially the Executive Power, would be proportionately augmented. It is entirely true, also, to say that a change in the foreign policy of the United States and great territorial expansion would lead, by different reasons, to an analogous transformation. In a word, the political machine of the United States was constructed in such a way that should one of its principal springs change it would break down."

E. B. S., Jr.

POWELL'S PRINCIPLES AND PRACTICE OF THE LAW OF EVIDENCE. Edited by JOHN CUTLER and CHARLES F. CAGNEY, Barristers-at-Law. London: Butterworth & Co., 1898.

The seventh edition of this excellent English treatise on Evidence presents an admirable example of the work of its famous editors. While they hesitate to extend unduly the length of the volume, they still retain the greater part of the principles discussed by the author and refrain from turning the work into a mere digest. The plan adopted by them resembles very much the general plan of the Hornbooks published by the West Company, namely, a general rule in large type at the head of each chapter and division, which rule is discussed at length in the text. Their method of confining the foot-notes to the citation of cases only is welcome to one who reads the book through and who does not use it as a digest in searching for a single point.

Turning to the text, we find that the author adopts Taylor's definition of Evidence in preference to the illogical and clumsy one of Stephen, and he makes the rather curious divisions of the subject as follows: (1) primary and secondary, (2) sufficient and satisfactory, (3) direct and inferential, (4) original and second-hand, or hearsay, (5) oral, documentary and real. These divisions are not carried out with any great degree of regularity; in fact, one of the few faults of the work is the lack of some definite plan of arrangement, such as is adopted by Stephen in his *Digest of the Law of Evidence*, although perhaps carried to an extreme by him.

In the second chapter, "The Functions of the Judge and Jury," we find an interesting discussion of the *scintilla* rule, which seems to have been repudiated by the English courts before it was declared exploded in Pennsylvania. Under "The Competency of Witnesses," in the third chapter, we are reminded that in England the fact that the defendant in a criminal case refuses to testify may be made the legitimate source of comment by counsel and court. On page 88, under "Presumptive Evidence," the case of *Wing v. Angrave*, 8 H. L. C. 183, is cited under the proposition that where two persons have perished in the same disaster, a presumption arises that they have

died at the same moment. It would seem that the case goes no further than to apply the modern rule that under such circumstances the burden of proving survivorship is upon the party alleging it.

Chap. 7, § 2, on "Privilege of Counsel," pp. 107-124, contains a most exhaustive discussion of the subject, in length almost disproportionate to the scope of the work. In opposition to this, the important subject of *Res Gestæ* is disposed of in the utterly inadequate space of two and one-half pages (pp. 136-139). No mention whatever is made of the famous case of *R. v. Bedingfield*, 14 C. C. C. 341, although it has always been regarded as leading, even by those who have dissented from the decision. The discussion of the Conspiracy rule is also meagre (pp. 141, 473), and no distinction is made between evidence of the acts of the conspirators and that of declarations by them after the execution of their common purpose. See *R. v. Blake*, 6 Q. B. 137, a case not cited.

The chapters on Admissions and Confessions are excellent, while the subject of Relevancy is contracted into a single chapter (Chap. 5), which is devoted to a discussion of the effect of the pleadings upon the evidence. The work closes with a reprint of all the English statutes which have any bearing, however remote, upon the subject. Upon the whole, the book being devoted to discussion, rather than to bald statements of the law, furnishes most interesting and instructive reading, and, it would seem, might repay the trouble and expense of an American edition.

A. E. W.

BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked * will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, Sixth and Chestnut Sts., Philadelphia, Pa.]

THE LAW OF DEBTOR AND CREDITOR. By RUFUS WAPLES. Chicago: T. H. Flood & Co. 1898.

EXPERIENCE IN THE UNITED STATES SUPREME COURT. By A. H. GARLAND. Washington, D. C.: John Byrne & Co. 1898.

THE ELEMENTS OF MERCANTILE LAW. By T. M. STEVENS. London: Butterworth & Co. 1898.

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THE FEDERAL COURTS. By CHARLES H. SIMONTON. Richmond, Va.: B. F. Johnson Publishing Co. 1898.

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FORMS OF PLEADING. By AUSTIN ABBOTT. Volume II. Compiled by CARLOS C. ALDEN. New York: Baker, Voorhis & Co. 1899.

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THE EVOLUTION OF A STRANGER'S RIGHTS, WITH SPECIAL REFERENCE TO PENNSYLVANIA STATUTE LAW.

The rights and privileges which a citizen of one country may enjoy while sojourning in another, is an interesting study, though less thought about and of much less importance than formerly. While a stranger in ancient times was, *ipso facto*, an enemy, and was treated as such, this truly barbarous rule has so far been abrogated in modern civilized states that the entire subject has become unimportant in most countries for the reason that the property rights of an alien differ little if any from the rights of a citizen.

There are some states in this country, however, where an alien's right to acquire and hold real property is still to some extent limited, and Pennsylvania is one of these.

The subject, therefore, is yet of interest to a Pennsylvania lawyer, not only by reason of its historical value, but from a practical standpoint as well. A brief reference to the historical side of this question in leading up to the law of to-day as existing in this Commonwealth, will be not only interesting in itself, but may be of real value in interpreting more modern law.

Our first inquiry naturally is :

§ 1. *What is an alien ?*—In very ancient times every stranger was an alien ; and not only was he an alien, but an enemy, until he proved himself a friend.

The modern test of an alien, *i. e.*, place of birth, had little weight with the roving tribes who peopled Europe before the crystallization of its population into nations. The inquiry rather was as to the blood of the newcomer. If he was of another race or even of another tribe, he was an alien.

As the organization of states became more complete, the people who were living in certain territory and governed by certain laws, began to think that their exclusive rights among themselves were derived more from those facts than from kinship. The old idea of race, however, had a strong influence upon the laws governing who should become citizens, *vide* the treatment of the Jews in England, where they were kept out of the privileges of citizenship for a great many years, notwithstanding the fact that generations of them had been born on English soil and many Hebrew names were among those of England's most brilliant statesmen.

As far as is known, there were no very clear rules defining aliens until the thirteenth century. At that time an alien was defined to be, one born "beyond the ligeance of the king." Conversely, any one born in any territory, which at the time of his birth was subject to the king's authority, was a "natural born citizen."

The interpretation of the latter part of this law was settled in 1608 by Calvin's Case.¹ A child of Scottish parents had been born north of the line shortly after the accession of James VI. of Scotland to the throne of England. The question at issue was as to his rights of citizenship in England. It was decided that he was no alien, for the ligeance of the English king extended over Scotland at the moment of his birth. The circumstance that his parents are aliens will not affect the claim to citizenship of a child born on territory subject to the English king.

It was doubted at one time whether a child born abroad of English parents, would be a citizen of Great Britain.

¹7 Rep. 1.

Indeed, it was formerly held that he would not be, notwithstanding a curious decision which seems to have been rendered as early as 1290, allowing a son born abroad to claim the inheritance of his mother. It appeared that the wardship and marriage of two young ladies, sisters, had been granted to one Elyas de Rabayne. This man married one of the heiresses and sent the other abroad to be married, in order that her children might be aliens, thus intending to obtain the whole of the inheritance for himself. The foreign-born son was allowed by the court to claim his inheritance, although they declared the decision was to be no precedent for the future. It was made only to defeat the rascality of the guardian.

At any rate it was thought necessary to pass an act of Parliament providing that the children of English parents should be citizens of great Britain, even though they happened to be born beyond seas. An exception was made where a wife had gone beyond seas without the consent of her husband. In such a case the child was to be an alien.¹

In America the English common law rules were of course in force until changed by statute. As Chancellor Kent points out in his Commentaries,² the act of Congress passed in 1802 was retrospective only in its provision that children of American parents, born beyond seas, should be deemed citizens of the United States. For a time it seems that this question rested for its solution solely upon the principles of common law, but by the act of 1855, amending the act of 1802, it is now definitely provided that all children of American citizens, although they may be born abroad, shall be citizens of the United States, except in cases where the fathers have never resided in this country. Then the right of citizenship is not conferred upon the children.

Some doubtful questions arose after the war of the Revolution, with regard to the *status* of persons who were in this country during the war, but who had removed to England during that time or shortly after.

By the English law any person resident in the American colonies prior to the Revolution and subject to the colonial

¹25 Edw. III.

²Lec. XXV, p. 52.

governments, became a citizen of the United States by the treaty of peace of 1783, by which England recognized the independence of the American colonies.

By our law all such persons became citizens by the Declaration of Independence in 1776. In *Inglis v. Sailor's Snug Harbour*,¹ this rule was laid down and the right of *antenati* in general defined. If a man was born before July 4, 1776, left this country before that date, took up his residence in Great Britain and never returned, he never acquired a right of citizenship in this country. If he remained here until after the Declaration of Independence, he thereby became a citizen; but if he was an infant at that time, he might thereafter exercise a right of election, thereby deciding his allegiance. If a man was born after the Declaration of Independence, there was no doubt that he would be a citizen. The English courts would decide the same, except that where our courts reckon *antenati* as those born before July 4, 1776, the British reckon from the treaty of peace in 1783.

An interesting question arose in Pennsylvania in 1810, in the case of *Jackson v. Burns*.² William Jackson died intestate in Pennsylvania in 1784. At the time of his death he was the owner in fee of certain lands. His title was disputed, but for the purposes of the case the court ignored that question, as the decision went on another ground.

The dispute arose between those claiming under John Jackson, the elder brother and heir-at-law of William Jackson, and the defendants, who claimed adversely to William Jackson.

The single point decided by the court was as to the capability of John Jackson to inherit from his brother.

John Jackson was born in Ireland before the Revolution, and had never been in this country. It was contended,

(1) That he had a legal claim to the land of his brother, by virtue of the treaty of peace between Great Britain and the United States.

(2) That he had a right by the common law.

The first point the court did not discuss, because it had

¹ 3 Pet. 99.

² 3 Binn. 75.

already been decided in the negative by the Supreme Court of the United States in the case of *Dawson's Lessee v. Godfrey*.¹

That decision being a construction of a treaty by the court having the highest authority on such questions, was deemed binding upon the Pennsylvania Court. But the second point the court claimed the liberty to interpret for itself. Mr. Chief Justice Tilghman says :

"It remains then to be considered whether by the common law, as adopted in this State, John Jackson is an alien, incapable of taking land by descent.

"By the Declaration of Independence (fourth July, 1776), all political connection between Great Britain and the United States was dissolved. From that day the State of Pennsylvania became completely sovereign and independent ; and the people of Great Britain and Pennsylvania had no other relations to each other than that of aliens ; in war enemies, in peace friends. It has never been denied that this was the case so far as respected sovereignty and allegiance. But it has been contended that by the principles of the common law prevailing in both countries, certain rights flowing from former connection remained in the people of each ; that the right of inheritance was unimpaired, in all those who were born before the dismemberment of the British empire, because the people of both countries were once bound in allegiance to the same sovereign. Considering this subject on the principle of reason, abstracted from authority, it would seem that the right of taking by descent, should be governed by the condition of the party at the time of the descent cast ; because it is then that he is to enjoy the inheritance. The denial to aliens of the right of taking land by descent, must have been founded on political motives ; on the danger of giving too much influence to persons, who so far from having a common interest with the people of the country, may have an interest directly opposed to them. Now this danger is not lessened, by the circumstance of the people of two countries having been once bound in bonds of common allegiance. I suspect, if the principle contended for could be traced to its source, it would be found to have originated in another principle, not compatible

¹ 4 Cr. 321.

with the Constitution of Pennsylvania, or her sister states ; that is to say, that no man can, even for the most pressing reasons, divest himself of the allegiance under which he was born. . . . I am informed, however, and believe it to be a fact, that by the law as now held in England, citizens of the United States, born before the Revolution, are capable of taking lands in England by descent. It is supposed by some that merely for that reason the courts of the United States should extend the same principle to the subjects of Great Britain. To this I cannot assent. I confess I should be mortified if my own country was surpassed by any on the globe in acts of humanity and benevolence. But it is evident that courts of justice have no right to regulate these matters. They are for the sovereign power of the nation. The judges must decide according to the law. The English adhere to their principle, that those who were born under the king's allegiance can never be considered so completely aliens as to be incapacitated from taking land by descent. But I apprehend that they restrict the right of inheritance to the case of persons either born under the king's allegiance, or being under it at the time of the descent cast. I presume they do not extend it to all those who have owed a temporary allegiance ; for instance, to the inhabitants of a country conquered in war, and ceded by the treaty of peace to its former sovereign. This principle then, even if sound, cannot be applied to the circumstances of the United States ; because, although there was a time when the people of England and the United States owed allegiance to the same sovereign, yet there never was a time when the people of England owed allegiance to the United States."

This extract, from Mr. Chief Justice Tilghman's opinion, amply explains the decision as to this point. It also refers to the law of Great Britain, which, rather strangely, holds that all persons born in America before the treaty of peace in 1783, never became aliens so as to lose their right to inherit.

Of course all of these questions are now at rest, but it is curious to see into what a tangle the courts were sometimes led when deciding as to the devolution of real property.

It is highly probable that cases of a similar nature will arise in the near future, *apropos* of our new acquisitions of territory.

§ 2. *Right of Expatriation.*—In close connection with the preceding discussion is the question of the right of a man to change his allegiance at will from one state to another.

This topic is important here because, if the right of expatriation be denied, we have the strange spectacle of one man being claimed as a subject by two different nations. It was the denial of this right by Great Britain, and her acts in accordance with her denial, that brought on the war of 1812. "Once an Englishman, always an Englishman," is the familiar expression that embodies this idea.

This principle that a natural born British citizen was incapable of divesting himself of his allegiance to the Crown, was never definitely abandoned by Great Britain until 1870, when Parliament passed an act regulating the naturalization of aliens, etc., and among other provisions, the following: "Any British subject who has at any time before, or may at any time after the passage of this act, when in any foreign state and not under any disability, voluntarily become naturalized in such state, shall, from and after the time of his so having become naturalized in such foreign state, be deemed to have ceased to be a British subject, and be regarded as an alien." The act also makes certain provisions by which he may resume his allegiance within a limited time, should he so desire.

It was for a long time doubtful whether an American citizen could expatriate himself. It was thought by many that the right is an inalienable one, naturally belonging to every man; that it was so recognized in ancient times; and indeed this seems to be correct. Chancellor Kent points out in his Commentaries that Cicero considered it as "one of the firmest foundations of Roman liberty," that the Roman citizen could renounce his allegiance at pleasure. The argument continues that since the right of expatriation was anciently recognized to be an inalienable one, it was only denied to Englishmen by reason of the slavish practices introduced by the Feudal System, by which men became chained to the soil. That when the people emigrated to this country they left behind them all such practices and the laws that grew out of them. Finally, that the right of expatriation denied to Englishmen, revived to free Americans.

While this reasoning is theoretically satisfactory, and no doubt would have been recognized to be sound had we not been under the domination of the common law, yet the courts in this country expressed themselves as very doubtful whether the English law did not control us on that point.

The case of *Talbot v. Jansen*¹ decided in 1795 contains one of the most interesting discussions of this question that it has been my privilege to see. William Talbot had obtained and fitted out an American vessel as a sloop of war. He went to France and sold his vessel to Samuel Redick, a naturalized French citizen, but a born American. In pursuance of his original plan, he then took out naturalization papers for himself, took command of the vessel, having changed her name from "The Fairplay" to "*L'Ami de la Point-a-Petre*," and, in conjunction with another privateer of a similar character, captured a Dutch trading vessel, the Brigantine Magdalena, and took her into Charleston harbour as a prize.

The master of the vessel, Joost Jansen, filed a libel, alleging that his captors were citizens of the United States, with whom the United Netherlands were at peace, and asking for restitution.

One of the principal points at issue was the effect of William Talbot's emigration to France and his naturalization as a citizen of the French Republic.

Counsel for libellee very strongly argued that William Talbot became a French citizen by his act, and that consequently the United States courts had no jurisdiction over him or his prize. His words show the view which a large number of people in this country held concerning this matter.

He said "The right of expatriation is antecedent and superior to the law of society. It is implied, likewise, in the nature and object of the social compact, which was formed to shield the weakness and to supply the wants of individuals—to protect the acquisitions of human industry, and to promote the means of human happiness. Whenever these purposes fail, either the whole society is dissolved, or the suffering individuals are permitted to withdraw from it . . . It is the law of nature and of nature's god, pointing to 'the wide world

¹ 3 Dall, 133.

before us, where to chuse our place of rest and Providence our guide.' ”

He drew a distinction between allegiance and citizenship—contending that in this country we have no such thing as allegiance but only citizenship, which is in the control of the individual so that he may discard it at will. “Allegiance,” he said, was the product of the Feudal System and has no place in a free country.

He went on to discuss the manner in which one could exercise his right of expatriation and what acts would suffice to change his citizenship. He conceded that one could not expatriate himself in time of war, for this would be treason. And it would be “reprehensible” to do so at a time when his country is suffering from a great calamity. He concluded his argument by declaring that a man can not serve two masters, *i. e.*, cannot be a citizen of two states simultaneously, and since the United States had recognized the right of emigrants from other countries to become citizens of this, she had impliedly recognized the right of her own citizens to forswear their allegiance to her and to join themselves to other sovereignties.

On the other hand it was admitted that a citizen of the United States has a right to emigrate to other countries when he pleases, provided it is done *bona fide*, with good cause, and under the regulation of the laws; but it was insisted that in the present case the act was not done *bona fide*, but was contrary to law from the first, and, consequently, William Talbot never lost his character as an American citizen, even if he had acquired a citizenship in France.

The majority of the court delivered no opinion upon this particular point, but Mr. Justice Iredell in delivering his concurring opinion deals carefully with it.

He says: “The first point to be considered is,—

“Whether Talbot, at the time of his receiving the commission, and at the time of the capture, was a French citizen.

“This involves the great question as to the right of expatriation, upon which so much has been said in this cause. Perhaps, it is not necessary it should be explicitly decided on this occasion; but I shall freely express my sentiments on the subject.

"That a man ought not to be a slave; that he should not be confined against his will to a particular spot, because he happened to draw his first breath upon it; that he should not be compelled to continue in a society to which he is accidentally attached, when he can better his situation elsewhere, much less when he must starve in one country, and may live comfortably in another; are positions which I hold as strongly as any man, and they are such as most nations in the world appear clearly to recognize.

"The only difference of opinion is, as to the proper manner of executing this right. Some hold, that it is a natural, unalienable right in each individual; that it is a right upon which no act of legislation can lawfully be exercised, inasmuch as a legislature might impose dangerous restraints upon it; and of course, it must be left to every man's will and pleasure, to go off, when and in what manner he pleases.

"This opinion is deserving of more deference, because it appears to have the sanction of the Constitution of this State, if not of some other states in the Union. I must, however, presume to differ from it, for the following reasons :"

The reasons which the learned Justice gave are substantially two.

(1) Because the citizen owes certain duties to society; which has a right to claim him until these duties be fulfilled—therefore, the right of expatriation cannot be a natural right, for if it were so, society would have no claim at all upon the individual.

(2) If it be a natural, inalienable right, it should be exercised in time of war as well as in time of peace—yet all writers agree it cannot be exercised in time of war.

In this case the conduct of William Talbot plainly showed that his act was not *bona fide*, with intent to forever become a French citizen, consequently, on any ground, he had not in this case exempted himself from his responsibility as an American citizen.

It will be observed that this point was not considered necessary to the decision and the court as a whole shrank from deciding it.

The same question was treated in much the same manner

in the case of the *Trinidad and the St. Ander*,¹ decided in 1822. Mr. Chief Justice Marshall said: "Assuming, for the purpose of argument, that an American citizen may, independently of any legislative act to this effect, throw off his own allegiance to his native country, as to which we give no opinion, it is perfectly clear, that this cannot be done without a *bona fide* change of domicile under circumstances of good faith. It can never be asserted as a cover for fraud, or as a justification for the commission of a crime against the country, or for violation of its laws, when this appears to be the intention of the act. It is unnecessary to go into a further examination of this doctrine; and it will be sufficient to ascertain its precise nature and limits, when it shall become the leading point of a judgment of the court."

While no definite legislative act has ever been passed upon this question, the doubt indicated by the language of these decisions, to be in the minds of the court, was obviated by a declaratory act passed by Congress in 1868, declaring that "Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas, in the recognition of this principle, this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the government thereof; and whereas it is necessary to public peace that this claim of perpetual allegiance should be promptly and finally disavowed, therefore, be it enacted, that any declaration, instruction, opinion, order, or decision of any officers of this government, which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government."

This act seems to have been accepted as an interpretation of the common law, and the right is now recognized to be a natural one.

Many puzzling questions often arise in connection with the change of citizenship from one country to another.

¹ 7 Wheat. 283.

When does the protection of the old government cease? When does the new attach? Is naturalization necessary, etc., etc.? Sometimes, also, a citizen of one country may leave under such circumstances that he owes a duty to his government. If he subsequently comes within the jurisdiction of that country, can he claim the protection of his new sovereign against the old? All these are questions that are arising occasionally at this day. Some of them have been decided, while others are still in doubt.

It is generally conceded that two things are necessary to release an individual absolutely from his allegiance to his native State.

(1) A *bona fide* change of domicile.

We have seen what is meant by this in the case of *Talbot v. Jansen*; and,

(2) Naturalization according to the laws of the country of his adoption.

When these two elements concur, then, by both English and American law, the citizen has become an alien.

While the subsidiary questions that arise in this connection are not, perhaps, directly in line with the subject of this paper, which is intended to deal more with the rights of aliens, yet it may not be uninteresting to notice one or two of the leading cases that have arisen.

Two of these questions will be briefly referred to here.

(1) Supposing a man has become expatriated, by change of domicile and by naturalization, has he so completely severed his connection with the mother country that it no longer has any claim on him at all?

(2) May a citizen, under *any* circumstances, become expatriated without naturalization under a foreign State?

The first of these questions has given rise to the exchange of many diplomatic notes between this country and European countries, particularly Germany. Suppose a German emigrates to this country while under age, and becomes naturalized. He then returns to the Fatherland. Can he be held for military duty?

This precise state of facts arose in the case of Johann Knocke, a native of Prussia, who, after naturalization in this

country, returned to his native land. He was held by the Prussian Government for military service, and in his extremity went to Mr. Wheaton, then American Minister at Berlin, for advice. Mr. Wheaton advised him that he would be protected as long as he was in any other country but Prussia; "but having returned to the country of your birth, your native domicile and national character revert (so long as you remain in Prussian dominions), and you are bound to obey the laws as if you had never emigrated."

This unqualified statement strikes us as being a little startling and quite similar to the old English view. Very shortly after this incident the opposite view was expressed by the American diplomats; *i. e.*, that "the moment a foreigner becomes naturalized his allegiance to his native country is severed forever."

A middle ground has finally been settled upon, which is substantially that when a foreigner leaves some duty owing to his native country on his departure, he may, on his return, be held for that duty, but not for any other accruing after he had changed his domicile.

The case of Simon Toussig illustrates this point. He violated the laws of Austria while a native resident, and then to escape punishment went to the United States. After having declared his intention of becoming naturalized, he returned to Austria. He was arrested for his previous offences. The American consul refused to interfere, as the offences had been committed before Toussig had ever gone to America.

In such cases the jurisdiction of the home government does not attach until the emigrant has actually returned to its territory. Martin Kozta, a Hungarian refugee, after having in America declared his intention of becoming naturalized, went to Smyrna under the protection of a United States traveling pass. While there he was seized by some agents of the Austrian government, taken out in a boat and thrown into the sea. He was eventually picked up by an Austrian ship-of-war, "The Hussar." Austria refused to give Kozta up until the American ship-of-war, "The St. Louis," was sent to enforce the demand for his release. The American consul held that even allowing Austria's right to proceed

against the refugee upon his return to Austria, yet he was under the protection of the American flag, as long as he was on American or neutral soil, or on the high seas.

(2) As to the second subsidiary question in regard to whether a man may ever become expatriated without naturalization, only a word need be said.

It is generally recognized that there *may* be circumstances such that a man loses all claim to the protection of the United States even though he may be a natural born citizen and has never been naturalized in a foreign state.

To illustrate the point it will be sufficient to refer to the case of Francois A. Heinrich, who was born in New York. His parents were unnaturalized Austrians. When Francois was only three years old they returned to Austria, taking him with them, and neither child nor parents ever returned to this country. When he became of age Francois was conscripted into the Austrian army. He claimed exemption as an American citizen. The American consul refused to interfere for him, on the ground that he had completely expatriated himself. I venture to suggest that under the same circumstances a British citizen would have been protected by the Crown, but that, of course, is mere conjecture. This precedent seems to be an established one in the United States.

§ 3. *Rights of citizens domiciled abroad.*—A citizen of any country, who is temporarily residing abroad, is entitled to the protection of his home government in case his rights are interfered with.

If, however, he is residing permanently in a foreign country, the question arises, how far is he still to be deemed under the protection of his native flag and to what extent will his government interfere for him?

The British Foreign Office seems to hold that a permanent residence abroad in no wise detracts from the right of the citizen to the protection of the British Crown, and that that "protection" will be carried to the extent of interfering with the internal affairs of the country wherein her citizens are residents.

In America we have not yet carried our ideas of "protection" so far. The case of *Murray v. The Schooner Charming*

*Betsey*¹ arose out of an alleged violation of the Non-Intercourse Act of 1800, prohibiting American vessels from trading with France. It appeared that this schooner sailed from Baltimore, Md., to the island of St. Bartholomew's, where her cargo was disposed of, and thence to St. Thomas', where the vessel was sold to one Jared Shattuck, a native of Connecticut, but who had resided since his early youth in St. Thomas (a Danish dependency). He had married a wife, acquired property (some of which was only proper to be acquired by a Danish burgher), and had in every way manifested his desire to become a *bona fide* Danish subject, except that he had not become naturalized.

The schooner having been reladen, was bound for Guadeloupe when she was captured by a French privateer. A few days later she was captured by the United States ship "Constellation" and taken to the island of Martinique. From there the "Charming Betsey" was sent to the United States for adjudication.

One of the main points at issue was as to the *status* of Jared Shattuck—and particularly whether he was comprehended in the terms of the Non-Intercourse Act.

On this point, Mr. Chief Justice Marshall said: "Whether a person born within the United States, or becoming a citizen according to the established laws of the country, can divest himself absolutely of that character otherwise than in such manner as may be prescribed by law, is a question which it is not necessary at present to decide. The cases cited at bar, and the arguments drawn from the general conduct of the United States on this interesting subject, seem completely to establish the principle that an American citizen may acquire, in a foreign country, the commercial privileges attached to his domicile, and be exempted from the operation of an act expressed in such general terms as that now under consideration.

"Indeed, the very expressions of the Act would seem to exclude a person under the circumstances of Jared Shattuck. He is not a person under the protection of the United States. The American citizen who goes into a foreign country,

¹ 2 Cr. 61.

although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection; and the interposition of the American Government in his favor would be considered as a justifiable interposition. But his situation is completely changed where by his own act he has made himself the subject of a foreign power. Although this act may not be sufficient to rescue him from punishment for any crime committed against the United States, a point not intended to be decided, yet it certainly places him out of the protection of the United States, while within the territory of the sovereign to whom he has sworn allegiance and, consequently, takes him out of the description of the Act.

"It is, therefore, the opinion of the court that the 'Charming Betsey,' with her cargo, being at the time of her recapture the *bona fide* property of a Danish burgher, is not forfeitable, in consequence of her being employed in carrying on trade and commerce with a French island."

This language would indicate that the United States is not prone to follow and protect a citizen who has voluntarily acquired a permanent domicile elsewhere.

A paragraph from an editor's note in Wheaton's International Law well sums up this subject:¹ "In 1873, Mr. Fish issued instructions to the American Minister in France, in which, after quoting the above dictum of Chief Justice Marshall, he thus explains the principles upon which the American Government now acts in protecting its subjects abroad. 'If on the one hand the Government assumes the duty of protecting his rights and privileges, on the other hand the citizen is supposed to be ever ready to place his fortune and even his life at its service, should the public necessities demand such a sacrifice. If, instead of doing this, he permanently withdraws his person from the national jurisdiction; if he places his property where it cannot be made to contribute to the national necessities; if his children are born and reared upon a foreign soil, with no purpose of returning to submit to the jurisdiction

¹ Boyd's Edition, § 151 n.

of the United States, then, in accordance with the principles laid down by Chief Justice Marshall, and recognized in the Fourteenth Amendment, and in the Act of 1868, he has so far expatriated himself as to relieve this Government from the obligation of interference for his protection.

“‘Each case as it arises must be decided on its own merits. In each the main fact to be determined will be this,—has there been such a practical expatriation as removes the individual from the jurisdiction of the United States?’

“‘If there has not been, the applicant will be entitled to protection.’”

If the citizen is only temporarily abroad, it is understood that he must obey the laws of the country he is in, or else he is liable to the punishment usually inflicted by the law of that country.

§ 4. *Rights of Aliens in England and the United States.*

(a) *In General.*—It might seem more appropriate to discuss this subject under the head of “The Disability of Aliens,” but I speak of the rights of aliens advisedly, because, strictly speaking, at common law an alien had no rights at all, hence a discussion of this subject more properly is an *epitome* of the privileges which have, from time to time, been conferred upon him.

As I have just indicated, originally, at common law, an alien had no civil rights whatever. This idea was the lineal descendant of the theory that all strangers are enemies.

Though this stranger was without rights, he was not free from liabilities, as he was obliged to conform to the English law. He was considered to have enough privilege if he were graciously permitted to exist within the boundaries of his Majesty’s dominions. His taxes were even higher than the taxes of citizens.

Even foreign merchants had no legal rights until the passage of *Magna Charta* in 1215. By that great Act some few privileges were granted to them. Then came 16 Henry III., followed by the *Carta Mercatoria*, 31 Edw. I., which granted the first real concessions to this class of men who had done so much to make England great. Even merchants, however, were not allowed to own real property.

Probably by reason of the exceptions in favor of merchants, the rule was established that an alien could recover personal property in the courts. In the reign of Henry VI., a case seems to have carried this exception to the point of allowing an alien merchant to lease a house for the purposes of trade. But by Act of Parliament, 32 Hen. VIII., it was forbidden to any alien to hire or lease a house.

The law remained substantially in this condition until very recently in England—*i. e.*, that aliens could acquire and hold personal property—but not real. That is, they could not acquire real property at all by operation of law, and if they did by purchase, they held only *de facto*, liable to be dispossessed by the Crown by "office found" at any time, the Crown being considered to have an inherent right to expel all aliens and confiscate their property.

Why the distinction was made between personal and real property, has been the subject of some controversy. Blackstone assigns two reasons why no alien can acquire land by operation of law.

(1) That if this were allowed, since the owner of land owed allegiance to the king, this allegiance would be inconsistent with that which he owed to his own sovereign, and

(2) That such practices would subject the government to pernicious foreign influence.

As to the right of the Crown to confiscate land purchased by aliens, he says that this probably was to punish their presumption for attempting to acquire landed property—not a very valid reason it would seem to us.

It is suggested in Pollock and Maitland's "History of English Law"¹ that the true explanation is that the king's claim to seize all the land of aliens was a generalization from his right to seize the land of his French enemies. However that may have been there is no doubt that this right was often made use of as well as the right to expel, which latter was exercised for the last time in 1575, when all aliens were driven out. These rights of confiscation and expulsion have for many years been practically obsolete.

At the present time an alien in England may acquire, either

¹ P. 445.

by purchase or inheritance, and hold real and personal property in all respects the same as a native born citizen. These rights were conferred by the Act of Parliament of 1870, usually referred to as the "Naturalization Act." This act in the most complete manner, as far as regards property rights, obliterates the disability of alienage.

The laws of the United States are not yet so liberal towards aliens as the laws of England. The law relating to the holding of real property in the territories is fixed by act of Congress. By the act of 1887 it is made "unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States, or of some state or territory of the United States, to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein, in any of the territories of the United States or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts heretofore created: Provided, that the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty shall continue to exist so long as such treaties are in force, and no longer."

With respect to the right of aliens to hold property in the states the law is very much diversified, by reason of the fact that the regulation of the matter has been left to the states themselves. Presumptively, as the common law is applicable to all the states until altered by legislation, an alien cannot in any state take real property by operation of law, nor purchase an indefeasible title, unless this right has been given by legislation.

As to personal property, a general statement may be made that aliens may acquire and hold personal property, as if they were citizens, anywhere in the United States. Even in the absence of statutory provisions, it seems that they would be entitled to do so by the common law.

The law as to real property must be ascertained by a reference to the statute law of the various states. In the great majority of them the English rule has been adopted, often in language very similar to the English act, thus absolutely removing the disability of alienage. It is not the intention to examine the various state laws in this article, but to the general observation above, it may be added that in Oregon and California the Chinese are discriminated against; in others alien residents only can hold land, while in a few a declaration of an intention to become a citizen is a necessity.¹

(b) *Pennsylvania Statute Law*.—At the time of the separation of the colonies from Great Britain, the Commonwealth of Pennsylvania owned a large tract of unimproved land. It was obviously to her interest to sell as much of this land as possible, to serve the double purpose of benefiting her financially and of improving the country. For this reason the policy of the government was, for several years immediately following 1776, shaped to the purpose of disposing of as much of this waste territory as possible, and not only to citizens but to foreigners. Hence we find early laws passed by the General Assembly more favorable to aliens than later ones.

The first act upon the subject was passed in 1778.² It confirmed the titles of persons who had, as heirs, devisees or assignees, derived title to land from aliens who had settled in Pennsylvania, although they had never been naturalized. It did not in any way enlarge the rights of aliens themselves to acquire or hold land.

The next year an act was passed which, for the period extending from the date of the act, February 11, 1789, until the first of January, 1792, authorized alien friends to purchase and hold lands the same as though they were citizens. This act was kept in force by various renewing acts until 1797, when the unimproved lands having been mostly disposed of by the Commonwealth, and the same urgent need for money not existing, it was suffered to expire. No act has since been passed in this state granting such wide privileges of purchase to aliens.

¹ See Stimson's American Statute Law, § 6012 *et seq.*

² 1 Sm. L. 461.

About the same time, 1791,¹ an act was passed which held out still further inducements to foreigners to settle and acquire land in this Commonwealth. It provided that no person should be incapable of taking land by inheritance or by devise by virtue of being an alien, thus guaranteeing to prospective purchasers the security of being able to leave their property to their families, even though the latter were still in the old country.

To briefly summarize the rights of aliens to hold real property in this Commonwealth I will divide the subject into three topics :

I. CAPACITY OF ALIENS TO ACQUIRE AND TRANSMIT REAL PROPERTY BY DEVISE OR DESCENT.

As we have just seen, an alien may acquire property by devise or by descent as if he were a citizen, he is under no disability at all. This right must be distinguished from the capacity of an alien to leave property to his heirs or devisees. The act removes the disability to take; it does not affect the disability of an alien ancestor to transmit his property to his descendants or to his devisees. The fear of Blackstone's time, that the country would be subjected to pernicious foreign influence, or that the alien heir would be bound in allegiance to two sovereigns, seems to have lost its influence over the minds of legislators.

In *Rubeck v. Gardner*² it appeared that John Lawyer, an alien, had purchased lands in Pennsylvania and died.

The contest arose between his heirs and his widow, in whom the Legislature had vested the title, presuming it to have escheated to the Commonwealth. Mr. Justice Sergeant, in delivering the opinion of the court says : " The main question raised by the plaintiff in error is, on the due construction of the act of twenty-third February, 1791; did that act, as the plaintiff in error contends, authorize a citizen or subject of a foreign state to take lands in Pennsylvania by devise or descent, from an alien who had purchased them without having complied with the conditions imposed by the law ?

¹ 3 Sm. L. 4.

² 7 Watts, 455.

It seems to me that this construction would be contrary to the letter of the act and its whole object and design. The act was passed, as the preamble recites, for the encouragement of persons purchasing lands in this State; and therefore must naturally refer to persons purchasing lawfully, and not to persons acquiring lands here contrary to law. It enables every person, being the citizen or subject of any foreign state, to acquire and take, by devise or descent, lands and other real property in this Commonwealth. A title by devise or descent is a derivative title; it can rise no higher than its source. The devisee or heir can only take what the ancestor had. But if the ancestor was an alien, and as such incompetent to take, and on his death his property escheated, there was nothing to descend or pass by will. If this act were to receive the construction contended for by the plaintiff, the heir or devisee of an alien would enjoy a greater and more entire estate than the alien himself had: whereas, it would seem to be the object of the act to enable a party to transmit an estate legally purchased."

The right to devise property acquired by purchase, or to leave it to their heirs under the intestate laws, has since been conferred upon aliens to a limited extent.

By the Act of February 10, 1807,¹ it was provided in addition to the power of purchase, that aliens who had declared their intention of becoming citizens, could hold real property in fee simple. This necessarily carried with it the right to leave it to their heirs.

The amount to be so held was limited by the following clause: "No alien or aliens shall be competent to purchase and hold more than five hundred acres until after he or they shall have actually become a citizen or citizens of the United States."

It might be suggested that no *alien* could hold more than five hundred acres even after he had become a citizen, inasmuch as he would no longer be an alien, but the meaning of the clause is clear enough.

In 1818 we have an act which again enlarges the power of aliens to transmit real property acquired by purchase to their

¹ 4 Sm. L. 362.

heirs. The act of March 24¹ gave all alien friends, whether they had declared their intention to become citizens or not, the right to hold a limited amount of real property "to their heirs and assigns forever, as fully, to all intents and purposes, as any natural born citizen may or can do." The amount of property allowed to be so purchased and held under the provisions of this act was limited to five thousand acres.

By the Act of May 1, 1861,² aliens may hold real estate to the amount of five thousand acres and of a value not exceeding twenty thousand dollars in net annual income. This act says nothing specifically about the *quantum* of estate to be so held, but as it does not repeal the act of 1818, and is consistent with it, there is no doubt that the same provisions as to that point would apply.

In the case of *Commonwealth v. Detwiler*,³ Mr. Justice Williams said: "Even as to real estate, the distinction between a resident alien friend and a citizen has disappeared in Pennsylvania and nearly every other State in the Union." Yet we must remember that the power of an alien to hold land acquired by purchase is limited to five thousand acres in amount and twenty thousand dollars in annual value.

As to the capacity of an alien devisee or heir to leave the property so acquired to *his* heirs or devisees, there is no question. As he can thus acquire a fee simple, he can of course leave the same to his heirs. But if he purchases beyond the limit the excess would escheat to the commonwealth.

2. CAPACITY OF ALIENS TO ACQUIRE REAL PROPERTY BY PURCHASE.

This topic has already been touched upon. The act of February 10, 1807⁴, was the first permanent act to be passed granting powers of purchase to aliens. As indicated above, this act limited the power it conferred to aliens who had declared their intention of becoming citizens, and the amount of land to five hundred acres.

¹ Sm. L. 133.

² P. L. 433.

³ 131 Pa. 614.

⁴ *Supra*.

Then in 1814 an act¹ was passed permitting alien enemies who had declared an intention to become citizens, to "receive and hold" land, not exceeding two hundred acres in amount nor twenty thousand dollars in value.

In 1818² the limitations of the act of 1807 were loosened. The alien need not have declared his intention to become a citizen, and might purchase to the amount of five thousand acres.

The Act of 1861³ limited the value to a net annual income of twenty thousand dollars.

The word "purchase," as appearing in our acts, is strictly construed, and does not include the acquisition of title by curtesy.⁴ It is construed to mean purchase in the popular and not in the legal sense. Consequently there are still several means of acquiring title yet wholly denied to the alien.

This is the condition of the law in this State to-day.

For all practical purposes the alien friend is on the same footing as a citizen, but nevertheless there are limits to his purchasing power.

When Bonaparte, ex-King of Spain, came to this country to settle, he desired to purchase a large landed property, and was compelled to go over the river into New Jersey, when he would have preferred to acquire property in Pennsylvania. Our laws were not liberal enough for him. So we see that our restrictions have been of practical service in the past and may be in the future.

A great many acts confirmatory of previously acquired titles have been passed, but as they do not affect the capacity of an alien I shall not here refer to them.

3. RIGHT OF AN ALIEN TO DEAL IN PERSONAL PROPERTY.

As I have before indicated there are no restrictions upon the right of an alien in this country to purchase, hold and dispose of personal property as he sees fit.

¹ March 22, 6 Sm. L. 178.

² Act of March 24, *supra*.

³ May 1, *supra*.

⁴ *Reese v. Waters*, 4 W. & S. 145.

In *Commonwealth v. Detwiler*¹ Mr. Justice Williams says:

"We think the right of all persons, not alien enemies, to buy and hold, use and enjoy, personal property, whether corporate stocks or articles of merchandise, is older than the Constitution, and that citizenship of the United States is not necessary to its exercise. . . . In Pennsylvania, therefore, a resident alien friend can deal as freely in all forms of property, whether personal or real, 'to all intents and purposes as any natural born citizen or citizens may or can do.' He may embark in business, become a stockholder in a joint-stock association or corporation, become a manager or director, when not expressly made ineligible, and use, enjoy, control and direct his property, of whatever nature or kind, in the same manner as any natural-born citizen may do."

Thomas Raeburn White.

¹ *Supra.*

A HUNDRED AND TEN YEARS OF THE CONSTITUTION.—PART VIII.

Upon re-assembling, next day, the Convention at once resolved itself into a Committee of the Whole to consider both the Virginia and the New Jersey plans. In the long and exhaustive debate which ensued, it can be said with truth that it would be difficult to imagine a phase of the question—the broad, general question—or a single point in connection with it, that was not brought out. A vote was not reached until June 19th; and several speeches longer than any yet delivered, were made in the intervening three days. It is worthy of remark, however, that but few members participated. Two new debaters appeared, one on each side—and both from New York: Hamilton and Lansing. Of course, the former favored the Virginia plan, the latter the New Jersey plan—and *only one other member—the proposer of the plan, Mr. Patterson, raised his voice in support of it.* On the other hand, Messrs. Madison, Wilson and Randolph—to whom we may fairly add Mr. Pinckney and Mr. King—were determinedly against it. Mr. Lansing opened the debate in much the same way as did Mr. Webster many years later—he “called for the reading of the resolutions” at the head of each plan—for the purpose of contrasting them. He then stated truly enough that they were radically different in principle: “That of Mr. Patterson sustains the sovereignty of the respective States, that of Mr. Randolph destroys it. . . . The plan of Mr. Randolph, in short, absorbs all power, except what may be exercised in the little local matters of the States which are not objects worthy of supreme cognizance.” One would suppose that this strong contrasting of the two plans would be followed by an earnest advocacy of the one or the other on the ground of its intrinsic merit—nothing of the kind! He states his principal objections to the Virginia plan to be, first, the want of power in the Convention to propose it; and second, the improbability of its adoption! And Mr. Patterson, who followed him, said practically the same

thing: "Our object is not such a government as may be best in itself, but such a one as our constituents have authorized us to prepare, and as they will approve." It is true that he urged that the Virginia plan would be "enormously expensive"—and also that he based his contention to lack of power on the part of the Convention to propose it upon the lack of power in the *States themselves*, except by a unanimous vote, to do away with the Confederacy. The argument as to the lack of power in the Confederacy was well answered by Mr. Wilson in a few words—he "conceived himself authorized to *conclude nothing*, but to be at liberty to *propose anything*." He contrasted the two plans point by point—the great contrast really being that representation of the people at large was the basis of the Virginia plan—"the State legislatures the pillars of the other."

He also called attention to the danger of "legislative despotism" from a *single* body—a legislature should be bicameral.

Mr. Randolph followed in a strong speech, setting forth the need for a National Government. The Confederate plan had been tried and found wanting; a resort to coercion, as suggested in the New Jersey plan, would be an impracticable and cruel expedient, and national legislation over individuals must therefore be resorted to—and much more to the same effect. Mr. Dickinson made a motion, which was carried, to postpone consideration of the first resolution in the New Jersey plan to take up a resolution to the effect that the alterations in the Articles of Confederation should be such as would "render the Government of the United States adequate to the exigencies, preservation and the prosperity of the Union." The debate, however—or rather the attacks upon the New Jersey plan—continued on general lines, and Mr. Hamilton took the floor for the first time, delivering what has been termed a "highly nationalistic speech"—and so it was; but while, perhaps, he goes somewhat further than any of his fellow-members, many of his arguments are most cogent. He strongly contended that any arrangement which made the *State* governments instead of the General Government the most impor-

tant in the eyes of the people, would, to use the words of President Buchanan, "contain the seeds of its own dissolution." I commend all the speeches in this debate to the careful attention of all students of the subject. Mr. Hamilton concluded by reading a sketch of a plan, expressly disclaiming any intention to lay it before the Committee *as such*, but submitting it as a general statement of his ideas. I propose to give this sketch in full, for several reasons: First, because it shows how strongly the need of a General Government was felt by one of the ablest men of the day; second, because it represents the high-water mark of nationalistic utterance in the Convention, and lastly, because it is more like—or rather, less unlike—the Constitution as finally adopted, than is the New Jersey plan:

I. The Supreme Legislative power of the United States to be vested in two different bodies of men: the one to be called the Assembly, the other the Senate; who together shall form the Legislature of the United States, with power to pass all laws whatsoever, subject to the negative hereafter mentioned.

II. The Assembly to consist of persons elected by the people to serve for three years.

III. The Senate to consist of persons elected to serve during good behavior; their election to be made by electors chosen for that purpose by the people. In order to do this, the States to be divided into Election Districts. On the death, removal or resignation of a Senator, his place to be filled out of the district from which he came.

IV. The Supreme Executive authority of the United States to be vested in a Governor, to be elected to serve during good behavior; the election to be made by electors chosen by the people in the Election Districts aforesaid. The authorities and functions of the Executive to be as follows: To have a negative on all laws about to be passed; to have the direction of war when authorized or begun; to have, with the advice and approbation of the Senate, the power of making all treaties; to have the sole appointment of the heads or chief officers of the Departments of Finance, War and Foreign Affairs; to have the nomination of all other officers (ambassadors to foreign nations included), subject

to approbation or rejection of the Senate; to have the power of pardoning all offences except treason, which he shall not pardon without the approbation of the Senate.

V. On the death, resignation or removal of the Governor, his authorities to be exercised by the President of the Senate till a successor be appointed.

VI. The Senate to have the sole power of declaring war; the power of advising and approving all treaties; the power of approving or rejecting all appointments of officers, except the heads or chiefs of the Departments of Finance, War and Foreign Affairs.

VII. The supreme judicial authority to be vested in judges, to hold their offices during good behavior, with adequate and permanent salaries. This court to have original jurisdiction in all causes of capture, and appellate jurisdiction in all causes in which the revenues of the General Government, or the citizens of foreign nations, are concerned.

VIII. The Legislature of the United States to have power to institute courts in each State for the determination of all matters of general concern.

IX. The Governor, Senators, and all officers of the United States, to be liable to impeachment for mal- and corrupt conduct; and upon conviction, to be removed from office, and disqualified from holding any place of trust or profit; all impeachments to be tried by a court to consist of the Chief ———, or Judge of the Superior Court of Law of each State, provided such judge shall hold his place during good behavior and have a permanent salary.

X. All laws of the particular States contrary to the Constitution or laws of the United States to be utterly void; and the better to prevent such laws being passed, the Governor or President of each State shall be appointed by the General Government, and shall have a negative upon the laws about to be passed in the State of which he is Governor or President.

XI. No State to have any forces, land or naval; and the militia of all the States to be under the sole and exclusive direction of the United States, the officers of which to be appointed and commissioned by them.

It is amusing to picture to one's self the feelings which the reading of this "sketch" must have aroused in Yates, Lansing, Luther Martin, and others like them; horror, amazement and disgust must have filled their minds; it was an "abomination unto them." There is little resemblance between either the sketch or the New Jersey plan and the Constitution; but I have said that the sketch was less unlike it than the plan. Let us compare both with it, and see.

First. The sketch and the Constitution provide for a single Executive—the plan for a plural Executive—at least by strong implication.

Second. The sketch and the Constitution provide for a bi-cameral Legislature—the plan for a single house.

Third. The sketch and the Constitution provide for the election of the Executive by electors chosen by the people—the plan for an Executive chosen by "the United States in Congress."

Fourth. The sketch and the Constitution provide for the election of one branch of the General Legislature by the people—the plan does not provide for the direct participation of the people in the General Government at all.

Fifth. The sketch and the Constitution provide for the creation of inferior courts by Congress—the plan does not.

Sixth. The sketch and the Constitution provide for a successor—practically the same successor—to the Executive Officer upon his death, etc.—the plan does not.

Seventh. The sketch and the plan provide for the nomination of various officers to the Senate by the Executive—the plan has no such provision.

Eighth—and most important—Neither the sketch nor the Constitution profess to be amendments to or revisions of the Articles of Confederation; the plan is avowedly nothing else. I think I may say with entire confidence, that excepting the provision for a Supreme Court to be appointed by the Executive, and its jurisdiction, there is not a line in the plan in which a resemblance to the Constitution can be found.

Mr. Hamilton's sketch provoked no comment. His ideas were far in advance of what the Convention was prepared to do—for they meant the practical annihilation of the States even as local autonomies.

Next day the resolution of Mr. Dickinson was voted down, and the debate was closed by Mr. Madison in a long and able speech, in which he showed the inadequacy of a *Confederacy* to the needs of the country. He cited numerous examples of confederacies in past times—"the Amphictyonic and Achæan Confederacies among the ancients, and the Helvetic, Germanic and Belgic among the moderns"—in support of his argument. In all of them there had been a tendency by the members to encroach upon joint body. At the conclusion of his speech, a motion to postpone the first resolution of the New Jersey plan was carried by a vote of all the States except New York and New Jersey. And a motion by Mr. King, to the effect that the Committee rise and report the Virginia plan as before, was carried, New York, New Jersey and Delaware voting "no," and Maryland being divided.

But the matter was far from settled. The whole question was discussed again in Convention, and a few new ideas were brought out, although much that had been said before was said over again, as is usual in such cases. The immediate question before the house was the first resolution of the Committee's report, to the effect that a National Government ought to be established. Mr. Wilson took occasion to say that he did not favor the abolition or practical annihilation of the State Governments—quite the contrary; and the same thing was said by Mr. Mason a little later. It is quite instructive to note the varied opinions with regard to the actual status of the States. Mr. King, for example, asserted that the States were not really "sovereign"—that if they retained some portion of their sovereignty, they had certainly divested themselves of essential portions of it; while Mr. Martin declared that the separation from Great Britain placed the thirteen States in a "state of nature toward each other"—and that but for the Confederation they would be so still. This was utterly denied by Mr. Wilson and Mr. Hamilton, Mr. Wilson saying that they had been declared free and independent as "*United Colonies*."

I do not propose to discuss this question over again. In a former article I have tried to show briefly that Mr. Martin

was right: I merely notice these utterances, as evidence that the ideas of "divided sovereignty" and of our being "one people" from the beginning had very respectable supporters at the time.. Mr. Ellsworth now moved to strike out the word "National" in the resolution, so that it would run, "The Government of the United States ought to consist," etc. The advocates of a General Government cared little what it was called; and as this change would probably soothe the feelings of many whose feelings would have to be soothed, no objection was made to it; and of course the corresponding change was made in all subsequent resolutions. Considerable importance is attached to this by later writers, as tending to prove that the idea of a truly "national" Government was explicitly abandoned. Nothing could be more misleading. The term "National" was supposed by some to savor of undue centralism, of the total demolition of Statehood, which was never seriously thought of by any appreciable number of delegates. The real opponents of the Virginia plan were just as determinedly so as ever, for when the second resolution providing for a bi-cameral Legislature came before the House, Mr. Lansing once more stated that the real question was whether the Convention proposed to adhere to the "foundation of the present Confederacy," again urging the lack of power on the part of the Convention to do anything else than adhere to that foundation, and the impossibility of inducing the people to approve of anything different. He attacked with some force the provision giving the General Legislature a negative upon State enactments. He moved, as a substitute for the second resolution, "That the powers of legislation be vested in the United States in Congress." This motion was lost by the usual vote. Dr. Johnson, of Connecticut, said that if the advocates of the Virginia plan could show that the individuality of the States would not be endangered by the plan, many of their objections would be removed. He was ably answered by Mr. Wilson and Mr. Madison. The remarks of the latter were so very clear and comprehensive that I will try to give the substance of them. He contended that there was less of danger of encroachments by than upon the General Government, and that en-

croachments by it were lesser evils than encroachments upon it; that the history of confederacies the world over had shown that the tendency was rather toward anarchy than toward despotism—of which the existing Confederacy was a shining example. In answer to the objection that under the proposed General Government the tendency would be the other way, he said that even supposing that indefinite power were to be given to the General Legislature, there was no reason to fear that it would take from the States any branch of their power whose operation was beneficial, instancing the existence undisturbed of townships, etc., within the States, whose local authority no legislature had interfered with. The great objection to a General Government was the impracticability of its extending “its care to all minute objects which fall under the cognizance of local jurisdictions.” If such care were practicable, “the people would not be less free as the members of one great Republic than as members of thirteen small ones.”

“Taking the reverse as the supposition, that a tendency should be left in the State Governments toward an independence on the General Government, and the gloomy consequences need not be pointed out.” Were ever words more prophetic? And mark what follows immediately: “The imagination of them must have suggested to the States the experiment we are now making, to prevent the calamity, and must have formed the chief motive with those present to undertake the arduous task.” The second resolution was passed, Connecticut this time voting with the majority. Mr. Madison’s arguments must have satisfied Dr. Johnson!

The next question was on the third resolution—and the first discussion was as to the way in which the members of the first branch of the General Legislature should be elected. The resolution said “by the people of the several States.” General Pinckney moved to substitute that they should be elected “in such manner as the Legislature of each State should direct.” This was not avowedly intended to give the election to the States as such, but it was so interpreted by Mr. Martin and Mr. Hamilton, the former instantly seconding the motion, the latter opposing it because

it "would essentially vitiate the plan. It would increase that State influence which could not be too watchfully guarded against." Election by the people was strenuously advocated by Mr. Mason, Mr. Wilson and Mr. King. Mr. Rutledge denied that there was any solid distinction between a "mediate and immediate election by the people," and thought a better class of men would be sent to the General Legislature by the State Legislatures than by the people. The three gentlemen just mentioned thought the distinction most vital; they urged that the direct participation by the people in the new government was "the foundation of the fabric"—elections by Legislatures would not be actuated by the sentiments of the people; indeed, there was an official legislative sentiment opposed to the General Government, and, moreover, the Legislatures would choose men subservient to their own views. We seem to have had examples of the converse of this proposition in these latter days! General Pinckney's motion was lost, Connecticut again in the minority this time. The resolution was then passed as reported, New Jersey alone dissenting. Maryland, as usual, divided. One cannot fail to observe the constant but abortive attempts of the "State rights" men to engraft upon the plan something clearly recognizing those "rights," or more properly, those *powers*, which would stamp the States as distinct and complete sovereignties. And it is also not to be forgotten, that it was not only the large States—repeatedly stated to be only three—which were opposed to these attempts.

The debates continued on various points and questions, without anything of importance with regard to the inquiry in which we are now engaged, until June 27, when the resolutions as to suffrage in the two branches of the General Legislature came before the House. The seventh resolution provided that representation in the first branch ought to be in proportion to the number of white and other free inhabitants, etc.

Mr. Luther Martin immediately took the floor, and in a speech of some length, and "which was delivered with much diffuseness, and considerable vehemence," proceeded to lay down the whole anti-national position, contending that the

new Government should be organized for *States*, not for *people*, and that the proposed plan would leave the small States wholly at the mercy of the large ones—taking for granted that it was at least probable, if not certain, that the representatives from the large States would always be found voting on the same side. At the conclusion of Mr. Martin's speech, Mr. Lansing, seconded by Mr. Dayton, moved in substance that the right of suffrage be the same as under the Confederation. Mr. Williamson observed that if the States were equally sovereign now, they would retain that equality when each one had parted with equal portions of it. Mr. Madison said that the fallacy in the reasoning of the other side was in confounding a mere treaty between sovereign States with a compact by which an authority was created paramount to the parties, and making laws for the government of them. He likened the States in the proposed plan to counties—and contended that the true interest of the small States was to make that resemblance as strong as possible: "In a word, the two extremes before us are, a perfect separation, and a perfect incorporation of the thirteen States. In the first case, they would be independent nations, subject to no law but the law of nations. In the last, they would be mere counties of one entire republic, subject to one common law. In the first case, the smaller States would have everything to fear from the larger. In the last, they would have nothing to fear," etc., etc. Dr. Johnson said, truly enough, that the controversy was likely to be endless where the starting point of the contestants was not the same—same regarding the States as *States* and others as merely parts of a State. (I do not quote him *verbatim*.) His conclusion was that these two ideas might be and should be combined—by giving the people as such representation in one branch and the States representation as such in the other—a view which, as we know, finally prevailed, though with an important qualification, as will be noticed later on. The great advantage in point of security to the smaller States by uniting with the large ones under one government was well pointed out by Mr. Gorham. The plan was not sufficiently "National"—that is, centralized—to suit Mr. Read.

But Mr. Madison and Mr. Gerry (who, by the way, asserted that the States never were independent), and others, while urging consolidation, and picturing the dissolution of the Union as a dire calamity, were sensible of the unwisdom of entirely abolishing or ignoring the States. By a vote of six to four, and one divided—as usual—the clause in the seventh resolution, that the representation ought not to be according to that established by the Articles of Confederation, was passed. Every argument that could be imagined was brought forward—and most of them were unanswered and unanswerable—to show the advantage of all concerned, and the abstract justice of the rule of proportionate representation; but apparently without avail. The vote was just as it would probably have been if not a word had been uttered on either side. Once more, however, let it not be forgotten that only four States were against proportionate representation, three of the smaller ones joining with the larger ones on this and other kindred questions. The present vote, however, only decided that the old rule of representation should not obtain as to the first branch. It was now moved to postpone the rest of the seventh resolution, to take up the eighth, which provided for the same rule of representation in the second branch as in the first. This, of course, occasioned a long and warm debate; it was the rock upon which the Convention was nearly wrecked. It would not be profitable to follow it in detail. It was in the main, of course, the old fight between the nationalists and anti-nationalists. But here and there some things of interest and importance are to be found. Mr. Wilson called attention to the fact that the vote last taken if the delegates were to be considered as representing the *people* of the States, had shown that the people favored a change in the rule of representation in the proportion of ninety to twenty-two, and asked whether the government about to be formed was “for *men*, or for the imaginary beings called *States*?” He was, of course, for proportionate representation in both branches, believing that any other rule placed the majority in the hands of the minority. Mr. Ellsworth denied this, and said that it simply gave the minority a salutary check upon the

majority. As a possible instance of combination among the larger States, he said that if in pursuance of some commercial arrangement, "two or three free ports and no more were to be established," Boston, Philadelphia, and some port on the Chesapeake (in Virginia) might be chosen. The important point was brought out by Mr. Madison that it was not the size of the States, but their circumstances, which gave them different interests, and that the real difference was between the free North and the slave-holding South. Another difficulty suggested—and one which undoubtedly existed—was the inconveniently large number of Senators resulting from proportionate representation. Dr. Franklin suggested that on certain questions the States should have an equal vote in the Senate, and Mr. King expressed surprise that "if we were convinced that every *man* in America was secured in all his rights, we should be ready to sacrifice this substantial good to the phantom of *State* sovereignty," etc. Mr. Ellsworth said that while under a National Government, he should participate in *national security*, he wanted *domestic happiness*, dependent on local matters to which a National Government could not attend, and for which he looked to the State Government. Mr. King was for preserving the State governments to the extent necessary for those purposes. The vote resulted in a tie—under ordinary circumstances it would have resulted in the adoption of the resolution by a majority of one, Georgia and Maryland being divided. But Mr. Martin's colleague, Mr. Jennifer, was absent, and he alone cast the vote of the State. Strictly speaking, the vote was upon a motion of Mr. Ellsworth's, providing for one vote by each State in the Senate. In spite of the fact—for unfortunately it was a fact—brought out by Mr. Madison as to the real difference between the North and South, there had been no such grouping of States thus far. Another apparently remarkable feature of the debates is, that it seems to have been assumed that the votes of the representatives from any State, even under proportionate representation, would be unanimous upon all questions; that they would be like so many delegates to political conventions as we know them to-day. We must remember, however, that this was before the day

of political parties. Still, one would suppose that as this form of representation was designedly proposed to give the people, as such, a voice, it might readily have been seen that the views and interests of people in different parts of the same State are not always identical.

Expressions of some heat had been indulged in, and a deadlock was imminent, when General Pinckney suggested the appointment of a committee to "devise and report some compromise," which drew forth from Mr. Martin the remark that he had no objection, but that the smaller States would never consent to any diminution of their equal sovereignty. However, after some little discussion, a committee was appointed, consisting of one member from each State—Mr. Gerry, Mr. Ellsworth, Mr. Yates, Mr. Patterson, Dr. Franklin, Mr. Bedford, Mr. Martin, Mr. Mason, Mr. Rutledge, Mr. Baldwin. This committee reported two propositions, both, or neither, to be adopted. The first to the effect that each State should be allowed in the first branch one representative for every forty thousand inhabitants "of the description reported in the seventh resolution." States not containing that number (there is still one State which contains but little more) to be allowed one vote. "That all bills for raising or appropriating money, and for fixing the salaries of the officers of the Government of the United States, shall originate in the first branch of the Legislature, and shall not be altered or amended in the second branch; and that no money shall be drawn from the public treasury but in pursuance of appropriations to be originated in the first branch." The second, "that in the second branch each State should have an equal vote." Like most efforts at compromise, the report found but little favor with any one. It was most unsatisfactory to Nationalists, who could not see that there had been any substantial concession on the part of the small States—the provision as to originating money bills did not strike them as being such a concession—and they felt that the abandonment of proportionate representation in the Senate was a grievous error. Mr. Gouverneur Morris said flatly that State attachments and State importance had been the bane of the country. But others, while not liking the propo-

sitions, felt that even a compromise was better than nothing—and so they began to discuss the propositions somewhat in detail, and committed the clause fixing the representation in the first branch to a new committee. The clause relating to money bills was then postponed in order to take up the question of representation in the second branch.

Lucius S. Landreth.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

ATTORNEY AND CLIENT.

In New Jersey it would seem that an attorney has a lien on the money collected for his client, to the extent of his compensation for services. In deciding that such a lien cannot be destroyed by the employment of a new attorney, Vice-Chancellor Pitney, in *Trust Co. v. Paper Mill Co.*, 44 Atl. 638, gives some interesting information as regards the question of costs between the attorney and client and between the parties, under the English and American rules.

BANKS AND BANKING.

De Weese v. Smith, 97 Fed. 309, is a decision by Judge Phillips of the Circuit Court (W. D. Mo.) which, if affirmed by the Circuit Court of Appeals, may impose a serious limitation upon the power of the comptroller of the currency and may prove a blow to creditors of insolvent national banks. The comptroller had directed the receiver of the bank, in this case, to collect 75 per cent. from the stockholders, which was done, but finding that the sum collected was insufficient to meet the liabilities, he made a second assessment of 25 per cent. In an action by the receiver against a stockholder to collect the amount of the second assessment, it was held, (1) that the comptroller had exhausted his power when he had levied the first assessment, and (2) even if the second assessment was valid, the amount could not be recovered, since the liability of the stockholder was a single one, which must be enforced in a single action by the receiver or not at all, according to the common law rule that an entire cause of action may not be split up in separate suits.

Where a bank has paid money on a check, to which a material indorsement has been forged, the bank is liable, unless the depositor is guilty of such negligence as would estop him from claiming against the bank. The Court of Appeals of New Jersey has decided that where an indorsement has been forged, the mere fact that the

National
Bank, Action
by Receiver,
Two Assess-
ments by
Comptroller

Forged Check,
Duty of
Depositor

BANKS AND BANKING (Continued).

depositor keeps the returned check in his possession without informing the bank of the forgery is not negligence, in the absence of proof that he is acquainted with handwriting of the indorser: *Mech. Nat. Bank v. Harter*, 44 Atl. 715.

Rev. St. (U. S.), § 5136, empowers national banks "to exercise . . . all such incidental powers as shall be necessary to carry on the business of banking," etc. Under this section, it was held by the Circuit Court of Appeals, Eighth Circuit, that a national bank possessed the power to buy out another bank and to assume its liabilities in consideration of the transfer to the former of all the property, real and personal, and outstanding accounts of the latter: *Schofield v. State Nat. Bank of Denver*, 97 Fed. 283.

**Power of
National Bank
to Assume
Control of
Another Bank**

CARRIERS.

The Supreme Court of Illinois, following the Supreme Court of the United States in the *Express Cases*, 117 U. S. 1, has decided that a railroad may make a valid contract with an express company, and the employes thereof, exempting itself from liability for negligence to such employes: *Blank v. Ill. Cent. R. Co.*, 55 N. E. 332. The ground of the decision is that the railroad is under no public duty to furnish facilities to express companies, and the doctrine of non-exemption from liability for negligence applies only to cases where the railroad is under such a public duty. Magruder, J., dissented.

**Contract
Exempting
Carrier from
Liability for
Negligence
to Express
Passenger**

CONSTITUTIONAL LAW.

In 1899 the Legislature of Colorado passed a law limiting the time of work of employes in underground mines to eight hours. This law was attacked as a violation of the provisions of the constitution of Colorado, which guarantee its citizens freedom of life, liberty and property, to the same effect as the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Colorado declared the law unconstitutional, as being within the above prohibition and not within the reserved police powers: *In re Morgan*, 58 Pac. 1071.

**Eight Hour
Law for
Miners**

It will be remembered that a couple of years ago a precisely similar law of Utah was upheld by the Supreme Court of the United States, as being a valid exercise of the State police power and not opposed to the Fourteenth Amendment: *Holden v. Hardy*, 169 U. S. 366. In the opinion of Justice

CONSTITUTIONAL LAW (Continued).

Brown, in the latter case, the decision was based partly on a provision of the Utah constitution, giving the Legislature special supervisory power over the work of miners, but there was a strong dictum to the effect that such a law would come, independently of this special power, within the implied police powers of the State. However, in *In re Morgan, supra*, the Supreme Court of Colorado refused to follow this dictum, and intimated that Justice Brown was wrong. The attitude assumed by the Colorado court is certainly novel. There have been innumerable instances of cases where State courts have persisted in declaring State laws to be within the police power, until called sharply to task by the Supreme Court of the United States, but this is the first one brought to our attention where the Federal Supreme Court has intimated that a law would fall within the police powers, and the State court has thereupon decided that it would not. The opinion of Campbell, C. J., of the Supreme Court of Colorado, includes a long tirade on the inalienable right of the American workman to be forced to work in a mine as long as his employer chooses, very much on the style of the latter part of the opinion in *Goodcharles v. Wigeman*, 113 Pa. 431, which is cited with approval.

CONTRACTS.

The plaintiff deposited collateral with a bank, of which he was a customer, under an agreement whereby it was provided that the plaintiff authorized the bank at its option at any time to apply the collateral to the payment of any liability of the plaintiff to the bank, whether said liability existed at the time or should be created afterwards. Subsequently the bank bought a dishonored promissory note, made by the plaintiff, from the payee, and endeavored to apply the above collateral to its payment. The Court of Appeals of New York, in an elaborate opinion, decided that the agreement contemplated only those debts which would arise in the ordinary course of business between the plaintiff and the bank, and it did not include the purchase by the bank of a matured liability against the plaintiff: *Gillet v. Bank of America*, 55 N. E. 292.

A shrewd broker should not allow the payment of his commission to depend upon the completion of the sale. In *Owen v. Ramsey*, 55 N. E. 247, the broker, by allowing such a stipulation in his contract, lost his commission. The contract, under which he was to sell bonds, provided that his commission should

Pledge with
Bank, To
what Debts
Applicable

Brokers' Com-
missions,
When
Payable

CONTRACTS—(Continued).

be deducted from the payment for the bonds. He found a purchaser who was able and willing to take the bonds, but before the transaction was completed, the bonds were declared illegal and void and their delivery enjoined. The broker strenuously contended for the application of the principle that in real estate transactions the right of the broker becomes fixed when he produces a purchaser, no matter whether the conveyance is made or not, but the Supreme Court of Indiana decided that the above provision in the contract made a sale and payment conditions precedent to the recovery of the commission.

Unlike the lax rule adopted in Pennsylvania, the Supreme Court of New Hampshire holds that evidence of parol stipulations of the agent of a corporation, made previous to, or contemporaneous with, the execution of a written contract of subscription to stock, is inadmissible to vary the terms of the contract: *Shattuck v. Robbins*, 44 Atl. 694. In the latter case it was scarcely necessary for the court to go this far, because the representations of the agent were not as to the existence of a fact, but were merely the expressions of the agent's opinion that the corporation would act in a certain manner.

Plaintiff made a contract with the City of New York to reline the basin of one of the city ponds, one of the provisions of the contract being, "All loss or damage arising out of the nature of the work to be done under this agreement, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from incumbrances on the line of the work . . . shall be sustained by the contractor." It was also provided that the plaintiff should remove the water from the pond. There was a drain pipe to the pond, by which most of the water could be drawn off, leaving but a few feet for the contractor to pump off; but when the work was commenced, it was discovered that the drain pipe was completely blocked up. The plaintiff was therefore obliged to pump out the whole of the water, and he brought suit against the city for the extra work which he had done, at the request of the city engineer, in pumping off the water.

The Court of Appeals of New York decided that even under the clause above quoted the city was liable for the extra work, since both parties had entered into the contract presum-

Contract of
Subscription
to Stock,
Variance
by Parol

Extra Allow-
ance,
Unforeseen
Difficulties

CONTRACTS (Continued).

ably on the understanding that the drain pipe would work; therefore the difficulty did not arise "under the agreement," but entirely outside of the agreement, and therefore without the scope of the provision making the plaintiff responsible: *Horgan v. Mayor, etc., of New York*, 55 N. E. 204 (Gray and O'Brien, JJ., dissenting).

CORPORATIONS.

Fidelity Ins., etc., Co. v. Mechanics' Sav. Bank, 97 Fed. 297, a case which has been attracting some attention, has been lately decided by the Circuit Court of Appeals, Third Circuit. It appears that a statute of Kansas provides that after a corporation creditor has recovered a judgment against the corporation, which he is unable to satisfy, he may bring an action at law, for his own benefit, against any stockholder, and may recover against the latter for an amount equal to the value of his stock. In the above action, which was brought against a Pennsylvania stockholder in the Circuit Court (W. D. Penna.), the defendant pleaded, *inter alia*, that the corporation was indebted to him in an amount equal to that for which the plaintiff sued. It was held, (1) that the liability of the defendant was to be determined by the law of Kansas, since the obligation had accrued in that jurisdiction, and (2) that since this was an action by a separate creditor against the stockholder, the set-off was allowable, although if it had been an action by the receiver of the corporation for the benefit of all the creditors, such a defence would not have been available. While basing his decision upon the law of Kansas, Judge Acheson, in his opinion, approves of the above rule.

The Supreme Court of Ohio has affirmed the now familiar rule that a corporation may, in issuing stock, reserve a valid lien thereon for future debts of the stockholder to the corporation, provided notice of the lien appears on the certificate. In *Stafford v. Produce Banking Co.*, 55 N. E. 162, the principle was applied to the extent of holding the lien valid, even though the indebtedness did not arise until after the stockholder had transferred his certificate to a *bona fide* purchaser, but before the latter had perfected the transfer on the books of the corporation. Counsel for the transferee strongly urged the special capacities doctrine of corporations, contending that the charter did not expressly authorize the corporation to reserve a lien of this character. To this the Court replied, "Since the

Liability of
Stockholder
when Sued by
a Corporation
Creditor

Lien of Cor-
poration on
Stock for
Indebtedness
of Stockholder

CORPORATIONS (Continued).

right to enter into contracts is general, and denied only when prohibited by statute, or some consideration of public policy recognized by the courts, it would be more helpful, perhaps, to inquire for the statutory provision or the consideration of public policy by which this contract is forbidden. It is quite true that with respect to the franchises which corporations exercise, and in their dealings with the public, the statute is to be regarded as the source of their authority. But it would be difficult to maintain the proposition that in their transactions with their stockholders, or in the transactions of the stockholders among themselves, general rules do not apply, if consistent with the statute." Several cases denying this power to national banks were distinguished on the ground that the National Banking Act prohibits such contracts.

Following the Supreme Court of the United States in *Hawkins v. Glenn*, 131 U. S. 319, and *Scovill v. Thayer*, 105 U. S. 143, the Supreme Court of Maine has decided that no action may be brought by the assignee of an insolvent corporation against a stockholder to recover the amount due on his stock, until the amount of the stockholder's liability has been fixed by the insolvency court: *Gillin v. Sawyer*, 44 Atl. 677. In this case the assignee attempted to prove the exact state of the corporation's assets and liabilities on the trial of the action against the stockholder, but the court disregarded such proof.

To the same effect is *DeWeese v. Smith*, 97 Fed. (Circ. Ct., W. D. Mo.) 309, which holds that the statute of limitations does not begin to run in favor of a stockholder in an insolvent national bank until an assessment has been made by the controller of the currency, determining the amount of the stockholder's liability.

In modern times an information in the nature of a *quo warranto* is regarded as a remedy of a civil nature rather than criminal. Therefore the information need not state the offence with such particularity and certainty as is required in an indictment: *Ind. Med. Coll. v. People, ex. rel. Att'y Gen.*, 55 N. E. (Ill.) 345.

CRIMINAL LAW.

The so-called "Osteopaths" have been attacked in Ohio under the statute making it illegal for a person not a registered physician or surgeon to "direct or recommend for the use of any person, any drug or medicine or other agency for the treatment, cure or relief of

Osteopathy,
Practice of
Medicine.

CRIMINAL LAW (Continued).

any wound, fracture or bodily injury, infirmity or disease" (92 Ohio Laws, p. 44, § 4403 f.). In *State v. Liffing*, 55 N. E. 168, the osteopath was charged with recommending "a certain agency, to wit, a system of rubbing and kneading the body" for the cure of a person. The Supreme Court of Ohio, while refusing to decide whether or not an osteopath was a surgeon or not, held that "rubbing" or "kneading" did not come within the term "agency" under the statute, but that the latter term, on the principle of *noscitur a sociis*, must be confined to that which is similar to drugs and medicines, and did not include mere manual treatment; in fact, the court strongly intimated that the addition of the word "agency" did not materially broaden the scope of the term, "any drug or medicine." An order sustaining a demurrer to the indictment was therefore affirmed.

DEEDS.

Salvage v. Haydock, 44 Atl. (N. H.) 697, affirms the generally prevailing rule that possession under a defectively recorded deed is constructive notice to a subsequent grantee. Some courts hold that it is not of itself constructive notice, but it merely casts upon the grantee the duty of making reasonable inquiries as to the possessor's title.

Recording,
Constructive
Notice.

EVIDENCE.

While it is improper to instruct the jury that the fact that a witness is interested weighs against the value of his testimony, yet the trial judge may, and it is his duty on request, to call the attention of the jury to the fact of the witness's interest, and to allow the jury to give what weight to it they choose. In *State v. Carey*, 55 N. E. 261, a prosecution for bastardy, the trial judge instructed the jury that in determining the credibility of the relatrix, who had testified, they might take into consideration the fact that she was interested in the result of the suit, but that this fact would not permit them to give her evidence any less or greater weight than if they were considering her evidence in a case of another kind in which she might be interested. *Held*, by the Appellate Court of Indiana, that this instruction did not invade the province of the jury.

Interested
Witness,
Instruction
of Jury.

EXECUTIONS.

In accordance with the weight of authority, the Supreme Court of Massachusetts has decided that where a levy upon

EXECUTIONS (Continued).

Effect of Levy, Presumption personal property has been made under an execution, to which no return has been made, no presumption that the judgment of the creditor has been satisfied in whole or in part, but the burden is on the debtor to prove such satisfaction: *Smith v. Condon*, 55 N. E. 324.

HUSBAND AND WIFE.

The fact that a wife refuses to attend to her husband during his illness, when his means would enable him to hire a nurse, does not amount to "cruel" treatment on the part of the wife under a statute granting a divorce for such a cause: *Bonney v. Bonney*, 55 N. E. (Mass.) 461.

INFANCY.

The Court of Appeals of New York has properly decided that injustice may not be committed under the plea of infancy. In *Rice v. Butler*, 55 N. E. 275, the plaintiff, being 17 years of age, purchased a bicycle from the defendant on the installment plan, used it for several years and paid a number of installments. On coming of age she disaffirmed the contract, returned the bicycle and sued to recover the installments paid. The defendant claimed that the use of the wheel and its deterioration in value exceeded the sum paid. Assuming that the latter fact was true, in the absence of evidence to the contrary, the court reversed a judgment for plaintiff, since otherwise the plaintiff "would be making use of the privilege of infancy as a sword, and not as a shield." It would seem, however, that the Massachusetts courts have adopted a contrary rule: *McCarthy v. Henderson*, 138 Mass. 310; *Payne v. Wood*, 145 Mass. 558.

JUDGMENTS.

Where judgment has been obtained on a coupon cut from a bond, and an action is subsequently brought on another coupon from the same bond, even by the party to the first action or his privy, the former judgment does not operate as an estoppel on the ground that the causes of the two actions are the same, but it is incumbent on the party alleging the conclusiveness of the judgment to aver and prove that the precise question before the court has been considered and decided in the action on the former coupon: *Board of Commissioners v. Sutliff*, 97 Fed. (Circ. Ct. of App., 8th Circ.), 270.

MASTER AND SERVANT.

In *Saunders v. Eastern Hydraulic Co.*, 44 Atl. 630, the defendant employed a glazier to replace a pane of glass in a skylight in roof. In performing the work, the glazier sat down on the roof and while leaning over, in order to support himself, rested his weight upon the mullion which held the glass in the skylight. The mullion broke, and the glazier brought this action for negligence, contending that defendant had not furnished him a safe place in which to work. The Court of Appeals of New Jersey, in affirming judgment for the defendant, held that the only duty resting upon defendant was to make the mullion strong enough to bear the weight of the glass, and not that of the plaintiff, and that the plaintiff, in attempting to make the mullion perform a service for which it had not been reasonably intended, had assumed the risk.

Assumption
of Risk

MUNICIPAL CORPORATIONS.

A municipality may pass a valid ordinance forbidding the performance of worldly labor on Sunday, but such an ordinance must be of general application and must not be directed against a particular trade or class of traders. Therefore, an ordinance of the City of Denver, prohibiting the sale on Sunday of clothing and certain other enumerated articles only, was properly held void by the Supreme Court of Colorado: *Denver v. Bach*, 58 Pac. 1089.

Sunday
Ordinances,
Uniformity

PARTNERSHIP.

In an action by a firm creditor to hold a special partner in a limited partnership as a general partner, it was alleged that the capital required from the special partner had never been paid in. The Court of Appeals of New York held (1) that the rule that partnership books are evidence against the partners in favor of outside parties applies to the case of a limited partnership as well as of a general partnership; therefore the books were admissible against the special partner; and (2) that the fact that no entry appeared on the books, showing the payment by the special partner of his capital, warranted the court below in finding as a fact that the statement in the certificate, that the capital had been paid in, was false: *Hotopp v. Huber*, 55 N. E. 206.

Holding
Special
Partner as
General
Partner,
Evidence

PLEADING AND PRACTICE.

Except in New York, it seems doubtful whether the practice of withdrawing a juror in civil cases at the plaintiff's

PLEADING AND PRACTICE (Continued).

Withdrawal of Juror in Civil Cases request, so that there may be a mistrial, exists in this country. In deciding that in Oregon the plaintiff had no right to such withdrawal, Justice Bean, of the Supreme Court of Oregon, gives a history of the practice as it existed in England. *Usborne v. Stephenson*, 58 Pac. 1103.

REAL PROPERTY.

In Indiana, when the title of a grantee has been divested by breach of a condition subsequent, the grantor must re-enter before he is entitled to bring ejectment. Thus in **Breach of Condition, Re-Entry** *Preston v. Bosworth*, 55 N. E. 224, a lease of a gas property provided that if the grantee should abandon the well, the title should at once revert to and vest in the grantor. In an action by the grantor against the grantee to recover the land, the plaintiff's complaint alleged a breach of condition, but not a re-entry by the plaintiff. A demurrer to the complaint was sustained by the Supreme Court of Indiana; on the ground that the breach itself was not self-operative to divest the grantee's title, since it might have been waived.

A warranty of title in a deed is broken as soon as the deed is executed, where the grantor has not a perfect title. The Court of Appeals of Kansas has applied this rule to a case where the defect in the grantor's title was not apparent to the vendee. The deed was executed in 1882, but the vendee did not discover the defect until 1889. *Held*, that his lack of knowledge did not prevent the Statute of Limitations from running against him from 1882: *Jewett v. Fisher*, 58 Pac. 1023.

When a Fee Is Cut Down to a Life Estate, Power of Disposition In *Lambe v. Drayton*, 55 N. E. 189, land was devised to A. and her heirs, "to hold the said real estate to A., her lifetime." On A.'s death it was directed that the testator's executors should divide the land among his children. The Supreme Court of Illinois held, (1) that the rule illustrated in *Tyler v. Moore*, 42 Pa. 376, that where the premises of a conveyance grant a fee, the provision in the *habendum* that the grantee shall take only a life estate, is inoperative, applies to wills as well as to deeds, though of course if the premises of a will do not expressly grant a fee, the intention expressed in the *habendum* will control, and (2) since A. took a fee, the remainder over was void.

While the decision was correct, the reasoning of the Court

REAL PROPERTY (Continued).

in regard to the second proposition is peculiar. Of course it is plain that after the testator had given A. a fee, he could not turn around and give her an estate for life with a vested remainder over; but the Court treats the case as if it were one of an executory devise. It first quotes a rule from Kent's Commentaries, that "a valid executory devise cannot subsist under an absolute power of disposition in the first taker." Then it goes on to say that, "here the remainder over to the children attempted to be given by the third clause of the will was void, because by the first clause the preceding fee had been given to the widow, A.; and as the fee simple title, which had been given to her, included and involved the absolute power of disposition, the remainder in the third clause was void by way of executory devise." Now this rule of Chancellor Kent, whatever may be its logical sufficiency, is well recognized in New York and several other States, but it would seem that in the present case the court has misconstrued it in attempting to apply it to the facts at bar. The only case where the rule applies is where the limitation over is made upon the contingency that the first taker disposes, or does not dispose, of the land, for in such a case only is there an "implied power of disposition in the first taker." In the present case there was no such implied power as will be seen from a glance at the limitation, any more than there is an implied power of disposition in a limitation "to A. and his heirs, and if he dies unmarried, to B.," in which case it is admitted that Chancellor Kent's rule does not apply.

Perhaps the courts of the various States of the United States are almost equally divided upon the question whether or not the vendor of land by a deed absolute on its face has a lien on the land for the purchase money. In *Baker v. Fleming*, 59 Pac. 101, the question was presented for the first time before the Supreme Court of Arizona. Davis, J., in a lengthy opinion, reviews the authorities on the subject and comes to the conclusion that the rule of Pennsylvania, Massachusetts and other States, denying the existence of the lien, is more logical and fair, and is therefore the rule to be adopted in the territory of Arizona.

A. granted a strip of land to a railroad and covenanted that he (without mention of his assigns) would build a division fence, or not hold the railroad liable for injury to cattle. A. then conveyed the remainder of his land to B., who had notice of the covenant. *Held*, by the Supreme Court of Oregon, that under the second resolution in *Spencer's Case*, the covenant, pertaining as

Vendor's
Lien.

Covenant to
Build Fence,
Running with
Land.

REAL PROPERTY (Continued).

it did to a thing not *in esse*, was personal to A. and did not run with the land in the absence of mention of A.'s "assigns" in the deed: *Brown v. South. Pac. Railway Co.*, 58 Pac. 1105.

According to the Massachusetts rule, the liability of one who collects water in a trough or gutter and discharges it upon the land of another, is an absolute liability and is not based upon negligence. Therefore, in *Fitzpatrick v. Welsh*, 55 N. E. 178, the Supreme Court of Massachusetts affirmed the lower court in its refusal to charge that in such a case the plaintiff could not recover if the defendant had used ordinary care in the construction of the roof and gutter which accidentally threw the water upon the plaintiff's land.

Discharge of
Waters on
Neighboring
Property.

SET-OFF.

Where an action is brought against a builder under the Mechanics' Lien Law of New Jersey (2 Gen. Stat. 2067), the builder may not employ a set-off which has not arisen from the transaction upon which the suit is brought. And this notwithstanding § 19 of the same act, which provides that the defendant shall have "any defence or plea the builder might have to any action on the contract without this act": *Naylor v. Smith*, 44 Atl. (N. J.) 649.

Claim Against
Builder.

STATUTE OF FRAUDS.

The Kansas statute of frauds applies to contracts not to be performed within one year from the making thereof. In *Phoenix Ins. Co. v. Ireland*, 58 Pac. 1024, the Court of Appeals of Kansas decided that a parol contract between the insurance company and the insured, that the policy should be renewed from year to year, which agreement was terminable upon notice by either party, was not within the statute and was valid. The case principally relied upon was *Trustees of Baptist Church v. Brooklyn Ins. Co.*, 19 N. Y. 305, affirmed in 28 N. Y. 153.

Parol Contract
of Reinsurance
from Year to
Year.

SURETYSHIP.

The Supreme Court of Indiana has applied with some harshness the rule that a surety is released by reason of the alteration of the instrument without his consent. In *Moore v. Hinshaw*, 55 N. E. 236, an agreement was made between all the parties that a note bearing interest at eight per cent should be made, with one of them as surety. In pursuance of the agree-

Alteration of
Instrument
Under Agree-
ment With
Surety

SURETYSHIP (Continued).

ment a note was drawn with the interest space left blank, and, while in this condition, was signed by the principal and the surety. Afterwards the provision for eight per cent. interest was filled in by the payee in the absence of the surety. In an action against the surety, it was held that, as the note would have borne only six per cent. interest if the clause had been left blank (under a statute of Indiana), the subsequent alteration in the absence of the surety discharged him, even though the provision for eight per cent. interest was a part of his contract. This decision certainly carries to the limit the rule of suretyship upon which it is based.

SURVIVAL OF ACTIONS.

In *Cooper v. Shore Electric Co.*, 44 Atl. 633, an action for death by negligence was brought by the administrator of the deceased for the benefit of the father of the deceased, under the New Jersey act of March 3, 1848 (1 Gen. St. 1888, §§ 10, 11), providing that such action should be brought by the personal representative for the benefit of the next of kin. The decedent left also a mother, brothers and sisters. Pending the action, the decedent's father, the beneficiary, died. In a learned opinion, giving a résumé of the decisions on the doctrine of *actio personalis, etc.*, the Court of Appeals of New Jersey decided that the action did not abate, but might be continued for the benefit of the other parties entitled under the statute.

WILLS.

A., whose residence is New York, went to live temporarily with her daughter, B., in Saxony, where she executed a will in favor of "B. and her lawful issue." The question was whether a child, who had been lawfully adopted by B. according to the laws of Saxony, could share as one of the "lawful issue." *Held*, (1) that in the interpretation of the will the law of New York and not that of Saxony must govern, as being that of the testator's domicile, even though the will was executed elsewhere; (2) that therefore, notwithstanding the Saxon law, the adopted child was not entitled, since under the New York decisions the expression "lawful issue" was confined to actual descendants: *N. Y. Life Ins. v. Viele*, 55 N. E. (N. Y.) 311.

WILLS (Continued).

The testator made a bequest to his wife "in lieu of dower, and of any right which she might have in my personal estate as widow." The residue of the estate was divided ^{Widow as} among the "beneficiaries" of the will. It was ~~Beneficiary~~ contended that the widow was not a "beneficiary," since she had relinquished a valuable right for her legacy and therefore was not really "benefited," but the Supreme Court of Massachusetts thought that the testator's intention was clear to include her within the class: *Wood v. Packard*, 55 N. E. 315.

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IRREGULAR DIVORCE; ATTACK BY FOREIGN JURISDICTION.—An extremely interesting question was presented for adjudication in the recent case of *Pemberton v. Hughes*, 1 Ch. 781 (1899), and was the subject of a very full discussion.

In 1884 the plaintiff and one Erwin, both being domiciled in Florida, were married in that State. In 1888 Erwin, both parties being still resident in Florida, applied for and obtained from a Florida court a decree of absolute divorce on the ground of his wife's violent and ungovernable temper, the plaintiff neither appearing nor opposing the proceedings. Subsequently the plaintiff married one Pem-

berton, and now, Pemberton having died, the plaintiff seeks to recover a rent charge which her husband, Pemberton, had created on certain English estates in her favor. The reversioners defended on the ground that the Florida divorce was irregular and invalid in that the subpoena to appear did not leave—as was required by the rules of the court—ten clear days between the date of the writ and the time fixed for the wife's appearance.

In arriving at its conclusion the court disregarded the fact that the decree of the Florida court was being collaterally attacked—upon which it might well have based its judgment—*Ousley v. Lehigh Val. Trust and S. D. Co.* 84 Fed. 602 (1897); *Anderson v. Chicago T. and Trust Co.* 77 N. W. R. 710 (1899); *Isaacs v. Price*, 2 Dill. 371 (1872)—and founds its ruling upon the broad ground that, under the rules of international comity, a judgment of a foreign court having jurisdiction of the parties and subject matter will not be inquired into; that “for international purposes the jurisdiction and competency of a court does not depend upon the exact observance of its own rules of procedure.” *Donglioni v. Crispin*, L. R. 1 H. L. 301 (1866); *Vauquelin v. Bonard*, 15 C. B. N. S. 341 (1863); *Castrique v. Imrie*, L. R. 4 H. L. 414 (1870).

The contention in the case was that because of the irregularity in procedure the court did not acquire jurisdiction over the parties, hence the decree rendered was not one of a court of competent jurisdiction. This argument the court very properly overruled, for it is now well settled that jurisdiction for international purposes is clearly distinct from that for municipal purposes. In the former case jurisdiction to pronounce judgment in a suit depends solely on the right to summon a person before the tribunal to defend the suit, the competency of the court being the sole test. Piggott on Foreign Judgments (2d ed.), p. 129 *et seq.*; Wharton's Conflict of Laws, §792 *et seq.*

In this country, as in England, a decree of divorce, in so far as it affects the status of the parties, is a judgment *in rem*, and consequently the same conclusion would be reached in our own courts. The general rule as to judgments *in rem* being that a final judgment pronounced by a court of competent jurisdiction will be accepted as absolutely conclusive as to the merits of the controversy which it settles, it follows that such a judgment will not be impeached for a mere error in procedure; *Townsend v. Van Buskirk* 48 N. Y. Supl. 260 (1897); *Kriess v. Faron*, 118 Cal. 142 (1897).

MORTGAGE; CLOG ON EQUITY OF REDEMPTION.—*Santley v. Wilde*, L. R. 1 Ch. 747 (1899). Ever since the Court of Chancery intervened on behalf of the mortgagor when his estate was lost to him at law from failure to redeem by the appointed time, and gave to him, as a means of retrieving his property, the so-called “equity of redemption,” this creature of equity seems to have been one of its peculiar favorites. Adopted, as it seems, from the Roman law, it is held an inherent part in all mortgages: Jones on Mortgages, Vol.

II, 105, §1038; *Lee v. Evans*, 8 Cal., 424 (1857); *Wilmerding v. Mitchell*, 42 N. J. L. 476 (1880); *Benzein v. Lenoir*, 1 Dev. Eq. (16 N. Car.), 225 (1828), etc., etc. So jealously is it guarded that the mortgagor is not allowed by express agreement to divest himself of this right. No matter how clearly his intentions may be expressed, equity, with tender solicitude, as it were, lest he may have been impelled to such agreement by the hardship of circumstances, gives back to him what he has waived. In *East India Co. v. Atkyns*, Comyns 347, 349 (1791), it is said that if a man makes a mortgage and covenants not to bring a bill to redeem, nay, if he goes so far, as in Stisted's case, to take an oath that he will not redeem, yet he shall redeem. And see also 2 Story's Eq. Juris., §1019, and cases cited; *Willets v. Burgess*, 34 Ills. 494 (1864); *Baxter v. Child*, 39 Me. 110 (1855); *Henry v. Davis*, 7 Johns (N. Y.), Ch. 40 (1823), etc. So if there be an agreement to restrict this equity of redemption either as to time or persons, if the restriction is a *substantial* denial of the right to redeem it will be void. *Floyer v. Lavington*, 1 P. Wms. 269 (1714); *Newcomb v. Bonham*, 1 Vernon, 7 (1681), etc. But the right to redeem may be postponed for a *reasonable* time, but not so far as to become oppressive: *Talbot v. Braddill*, Vernon 183 (1683).

To the principles above stated Mr. Jones in the volume on "Mortgages," cited above, adds, §1044: "Neither is the mortgagee allowed to obtain a collateral advantage under the color of a mortgage, which does not strictly belong to the contract," and cites as illustrations of such stipulations the agreement that if interest is not paid at the end of the year it shall become part of the principal, an agreement for payment of a commission upon the rents collected by the mortgagee, etc. He closes his discussion of this point with a quotation from the case of *Jennings v. Ward*, 2 Vernon, 520 (1705): "A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement." This seemed for a while to be a fair embodiment of the law, as illustrated by the cases of *Broad v. Lelfe*, 11 W. R. 1036 (1863); *James v. Kerr*, 40 Ch. D. 449 (1889); *Field v. Hopkins*, 44 Ch. D. 524 (1890).

But in *Biggs v. Hoddinott*, L. R. 2 Ch. 307 (1898), we find a modification of the doctrine as above stated. In that case a mortgage of a hotel to a brewer contained a covenant by the mortgagors that during the continuance of the security they would deal exclusively with the mortgagee for all beer and malt liquor sold on the premises. The deed also contained provisos for the continuance of the loan for five years. The mortgagors having ceased to purchase beer of the mortgagee, he now moved for an injunction to restrain the breach of this covenant; the mortgagors also claimed to be entitled to redeem before the expiration of five years. The injunction was granted and the redemption before the expiration of five years was refused as not being an unreasonable restriction, the court laying down the principle that a mortgagee *may* stipulate for a collateral advantage at the time and as a term of the advance, *provided* the equity of redemption is *not* thereby *fettered* and the bargain is a fair

and reasonable one, entered into between the parties while on equal terms, without any improper pressure, unfair dealing or undue influence.

Last year (1899) a case arose in the Chancery Division involving the same principles, but falling on the other side of the line, it being there held that the collateral agreement was a clog on the equity of redemption, unreasonable as practically a denial of the right to redeem, and therefore void. This was the case of *Santley v. Wilde*, L. R., 1 Ch. 747. Here the sub-lessee of a theatre executed a mortgage for a valuable consideration on the term and agreed thereby to pay £2000 (the amount advanced by mortgagee), together with interest thereon at 6 per cent, and also to pay to the mortgagee *one-third the clear net profit rental of the theatre*. The mortgage was for the whole of the term less one day, and was redeemable only on payment of £2000, with interest, and *all other moneys covenanted to be paid*. This latter clause practically rendered it impossible to redeem before the end of the term, because only with the passing of time could the amount of such moneys due be ascertained. It was held, therefore, by Mr. Justice Byrne, in line with the principles of *Biggs v. Hoddinott*, *supra*, that this agreement was void, not simply because a collateral advantage was sought by the mortgagee out of the mortgaged property, but because such collateral advantage was an illegal clog on the equity of redemption.

What was said in *Jennings v. Ward*, *supra*, seems therefore to require some alteration, and the principle deducible from the cases would require it to read: "A man shall not have interest for his money, and a collateral advantage besides for the loan of it, if such 'by-agreement clog the redemption.'"

The question, then, as to what collateral advantage may be taken is to be decided with reference to its effect upon the equity of redemption, and under the rule above leaves, to a large extent, each case upon its own peculiar footing, and gives a convenient discretion to the Chancellor as to what should or should not be considered an unreasonable fetter on the equity of redemption.

BOOK REVIEWS.

WIT AND HUMOR OF BENCH AND BAR. By MARSHALL BROWN.
Chicago: T. H. Flood & Co. 1899.

In spite of the powerful rule of Mr. Dryasdust in courts of law it sometimes happens that successful revolts are made against his tyrannical power. Native wit can never be wholly stifled even by the musty odor of ancient parchments, and it often breaks forth to relieve the tedium of trials at law. It has been Mr. Brown's happy function to collect many of the choicest specimens of forensic cleverness when severed from purely legal things. He has gathered together for our amusement and pleasure many delightful anecdotes and witty sayings of lawyers and judges. Those lawyers who desire a refreshing book after a hard day's work will hail with laughter this motley jester among the sad colored law books. To those not conversant with the law it would, perhaps, not prove so attractive, as it has been observed that *legal jokes*—for lack of a better term—do not appeal to the lay world. Altogether the book in question is worthy of a place in any library.

E. B. S., Jr.

RODGERS ON DOMESTIC RELATIONS. Chicago: T. H. Flood & Co. 1899.

This is one of the most complete text books on the subject which has ever been written. The author treats the general subject in an exhaustive but at the same time concise manner, subdividing the main topic into the relations that exist: (1) between Husband and Wife, and, beginning with the marriage, shows the right which each acquires in the other's property, and the duties imposed on them; (2) between Parent and Child, under which head he treats concerning the custody of children, infancy, and illegitimate children; (3) between Master and Servant, and (4) between Guardian and Ward. He has not only written in an easy consecutive style, but he furnishes us with a complete, accurate and extremely useful work on the subject. He supports his statements in each instance by a host of authorities which he brings down to date. He states not only the common-law rule but the ways and instances in which it has been affected or altered by statutory changes. The book will prove a practical, useful and reliable source of information to all busy practitioners who desire an answer to a problem and have little time to explore digests.

J. B. C., 3d.

CIVIL PROCEDURE AT COMMON LAW. By ALEXANDER MARTIN, LL.D. Boston: Boston Book Co. 1899.

Although the majority of jurisdictions in the United States, as well as England, have abandoned the strict system of common law

procedure for either code procedure or a modification of that of the common law, the great majority of lawyers realize that a thorough general knowledge of the old common law system is essential for the thorough training of every practitioner. It is with this idea in mind that Dr. Martin has written this work.

There is a feature in this work that calls for the reader's praise. There are present everywhere in the book the plainest marks of long and careful preparation—something not as common as is desirable in these days of rapid work in every line. As Dean of the Law School of the University of Missouri and as lecturer in code, common law and equity procedure, the author has had a rare opportunity to prepare an admirably arranged and carefully considered work. While the work deals with all the stages of procedure from the issuing of the initial writ to the granting of execution, the major portion of the work is devoted to a description of the nature of the various causes of action and the general law of pleading. There are two especially interesting and exhaustive chapters—those upon the nature of the action of assumpsit and trespass on the case respectively.

As to the advantages and disadvantages of the various reforms in common law pleading, the author admits that the old system became impracticable as the business transactions of the community became more complex; but he still regards the present system as being a great distance from what is to be desired. But it is to be borne in mind that it is a question very difficult of solution how to have both the clear-cut issue of the common law pleadings and the admission of all the grounds of action and defence, which is called for by the progress of the courts of equity. E. W. K.

HANDBOOK ON THE LAW OF NEGLIGENCE. By MORTON BARROWS. St. Paul, Minn.: West Publishing Co. 1900.

The increase of civilization is marked as much by the increased production and use of labor-saving machinery as by anything else. This applies principally to manufactories and railroads, and it is with these that the great mass of the people are to-day chiefly concerned. Everything mechanical must be guided by some sentient, reasonable being, with a greater or less degree of care. It is because of lack of this care on the part of the operators of these machines, and also because of carelessness, bred by familiarity, on the part of those who come in contact in a non-professional way with things mechanical, that our courts to-day are flooded with cases of personal injuries resulting from negligence. It is a matter of pleasure to one interested in the progress of the law to see that this flood by no means threatens disaster, but will be productive of much good by running through well-defined legal channels. And this because the difficulty never was to be found in enunciating the principle, but in the application of that principle, however carefully laid down, to a more or less complicated state of facts.

At such a time the appearance of such a work as Mr. Barrows'

will be welcomed alike by bench and bar. It possesses the merit, in common with the rest of the valuable Horn-Book series, of originality of arrangement and clearness of expression. Anything that has any possible bearing on the law of negligence has been brought in by the indefatigable author. Carriers of goods and the liability of a master are given not undue space, and we are glad to see that a chapter has been devoted to the negligence of municipal corporations, although more space might be given to quasi-municipal corporations.

If we must criticise, we think a separate chapter might be given to the duty to insure safety. Moreover, the defence of contributory negligence has more to do with the decision of these cases than any other claim or defence, and additional space devoted to it would not be amiss. We also notice that no distinction is made between 81 Pa. and 81* Pa.; this is to be regretted, as the former has all the weight of the duly authorized reports of our State, while the latter has been justly termed a somewhat apocryphal volume. When this and other minor errors are corrected, we feel sure that every lawyer in active practice would be well repaid in having this work on his desk.

J. M. D.

THE LAW OF ANIMALS. By J. H. INGHAM, of the Philadelphia Bar. T. & J. W. Johnson & Co., Philadelphia. 1900.

A very interesting and, we believe, a unique volume has just been published in Mr. Ingham's *Law of Animals*. What the author says in his preface is so true and so well expressed that we quote it at length: "There is, in the author's opinion, natural cause for wonder why, at a time when of making many law-books there is no end, the large and important subject exploited in the present volume has been almost wholly disregarded. For just as the law of real property differs from that of personal property as dealing with what is immovable and indestructible, so the law of animate differs from that of inanimate property as dealing with powers of consciousness, volition and reproduction and liability to suffering and death—a distinction far more significant in science and philosophy, however it may be in jurisprudence, than that existing in the former case. As a matter of fact, these powers and liabilities in animal life form the basis of an elaborate system of rights and responsibilities which may be termed with perfect propriety the *Law of Animals*. The elements of this law have, hitherto, lain more or less concealed in numberless statutes, reports, digest and text-books. Hardly an index of any scope can be found in which the title '*Animals*' does not occur, accompanied by various cross references. And yet, so far as the present writer has been able to ascertain, no effort has ever been made to work these scattered elements into an organic structure. It is hoped, therefore, that this treatise may serve to the accomplishment of such an end. It must be premised that, animals being personal property, the whole law governing such property is applicable of course to them, but it is only such particular portions of that law

as relate distinctly to their peculiar qualities that can be called, with any technical accuracy, the Law of Animals. Matters unconnected with their natures, dispositions and habits, their liability to injure and be injured—which concern them and all other subjects of property alike—are not discussed here. With regard to the method of treatment adopted, it has been the object of the author to let the cases speak as much as possible for themselves—in other words to give, as far as is consistent with reasonable brevity, the facts and grounds of decision in all the more important cases rather than to furnish long lists of cases to support general legal propositions.”

The writer has been most happy in the general arrangement of his subject matter as well as in his style, which is clear and pleasing. It is refreshing to find a law-book of really literary merit. Not since the publication of Pollock's treatise on the law of Torts have we found one more easy to read. The reason is that text-book writers are lawyers first and rhetoricians afterwards. The same thing might be said of judges whose opinions are so frequently overburdened with learning and “latent ambiguities,” that what they really mean to say is largely a matter of speculation. Just as the Commentaries of Sir William Blackstone were the first coherent elucidation of the law of England, so is Mr. Ingham's book the first systematic treatment of the law of animals. To be sure one treats of many subjects and the other of but a single subject. However, both are pioneers in what was hitherto a more or less unknown country. The maps that have been prepared for us will vastly facilitate our journeys over both fields.

In short, Mr. Ingham's book is likely to become a standard work. He starts under favorable auspices—even the proof-readers seem to have been unusually industrious, as there is a notable absence of the typographical errors which so greatly mar legal compositions. We hope the book will meet with the success it deserves.

E. B. S., Jr.

BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked * will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, S. W. Cor. Thirty-fourth and Chestnut Streets, Philadelphia, Pa.]

COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. Vol. VII.
By **SEYMOUR THOMPSON, LL.D.** San Francisco: Bancroft-Whitney
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GREENLEAF'S TREATISE ON THE LAW OF EVIDENCE. Vol. I. Edited
by **JOHN HENRY WIGMORE.** Boston: Little, Brown & Co. 1899.

A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES. By **JULIUS WARE
PERRY.** Fifth Edition. Edited by **JOHN M. GOULD.** Two Volumes.
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* **REPORT OF THE FIRST ANNUAL MEETING OF THE NORTH CAROLINA
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* **STATE LIBRARY BULLETIN. LEGISLATION OF 1899.** Albany, N. Y.:
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* **THE EARLY DEVELOPMENT OF THE CHESAPEAKE AND OHIO CANAL
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[EDITORS' NOTE.—At the dedication of the new Law School Building of the University of Pennsylvania on the twenty-first and twenty-second of last month, addresses were delivered by James Barr Ames, Dean of the Harvard Law School; Sir Charles Arthur Roe, representing Oxford University; Samuel Dixon, of the Board of Trustees of the University of Pennsylvania, and William Draper Lewis, Dean of the Faculty of the Department of Law. We have published them in the present number of the AMERICAN LAW REGISTER in the belief that they contain much of interest to our readers. A complete account of the dedicatory exercises is soon to be published by the Faculty of the Law School.]

THE VOCATION OF THE LAW PROFESSOR.

On a broad shaded street in one of the most beautiful of New England villages, stands an attractive old Colonial house, the residence, at the close of the American Revolution, of a Connecticut lawyer. Hard by the house was the owner's law office, a small one-story wooden building much resembling the familiar district schoolhouse. There was nothing about it to catch the eye, but it has a peculiar interest for the lawyer, as the birthplace of the American Law School. For it was to this building that young men came from all parts of the country, to listen to the lectures of Judge Reeve, the founder of the celebrated Litchfield Law School.

It is indeed a far cry from the small lecture room of Judge

Reeve to this noble structure destined to be for centuries the spacious and well-appointed home of a great university law school. From her humbler home in Cambridge, I gladly bring the greetings and congratulations of the elder to the younger sister, and I am deeply sensible of the privilege of saying here a few words upon a topic that is near to the hearts of both.

On this red-letter day in the history of law schools, we may look back for a moment upon the path of legal education, if only to take courage for further achievement, as we watch the steadily growing conviction, in this country at least, that law is a science, and as such can best be taught by the law faculty of a university.

With the revival of interest in the Roman Law, students flocked to the mediæval universities, notably to Bologna and Paris; and in countries, where the system of law is essentially Roman, the tradition of obtaining one's legal education at a university has continued unbroken. Indeed, upon the continent of Europe a university law school is the only avenue to the legal profession. But the English Law was not Romanized. For this, any one who thinks of trial by jury, of the beneficence of English equity, and of the unrivaled English judiciary, may well be thankful. But as a consequence of the non-acceptance of Roman Law, early English lawyers were not bred at Oxford or Cambridge. For the universities were in the hands of the ecclesiastics, who naturally confined their attention to the canon and civil law. Another reason may be found in the well-known dialogue between Lord Chancellor Fortescue and the young Prince of Wales in praise of the laws of England. The Prince having asked why the laws of England were not taught at the universities, the Chancellor replied: "In the universities of England sciences are not taught but in the Latin tongue, and the laws of the land are to be learned in three several tongues, to witte, in the English tongue, the French tongue and the Latin tongue."

English lawyers, therefore, obtained their legal training in London, and, in early times, at the Inns of Court, which, with the dependant Chancery Inns, were called by Fortescue and Coke a legal university. In the days of these writers, the

term was not inapt. The membership of the inns was made up of students, resident graduates, called barristers, readers or professors, and benchers, or ex-professors, all living together in their dormitories and dining-halls, in that spirit of comradeship which has added so much to the attractiveness and influence of the legal profession. They lived, too, in an atmosphere of legal thought. Every day after dinner, and every night after supper, there were discussions of legal questions after the manner of a moot-court. There were also lectures by the older barristers, which were followed by discussions of the chief points of the lectures. But the lectures and discussions came in time to be regarded as too great a burden upon the lawyers. They were at first shortened, and finally, in the latter half of the seventeenth century, given up altogether.

A legal education being no longer obtainable in the Inns of Court, students of law trusted to private reading, supplemented at first by experience in attorneys' offices, but after Lord Mansfield's day, in the chambers of special pleaders, conveyancers or equity draughtsmen.

The decay of the Inns of Court seems not to have excited, for two hundred and fifty years, any adverse comment. But towards the middle of this reforming century many influential lawyers were impressed with the need of a better preparation for admission to the bar. In 1846 a Parliamentary Commission, after hearing the testimony of a large number of witnesses, reported that the state of legal education in England was "extremely unsatisfactory and incomplete," and "strikingly inferior to such education in all the more civilized states of Europe and America," and recommended that the Inns of Court should resume their ancient function of a legal university. Five annual courses of lectures in law were the meagre result of this report.

In 1855 a second Parliamentary Commission, including Vice-Chancellor Wood, Sir Richard Bethell (Lord Westbury) and Sir Alexander Cockburn, recommended that a university be constituted with a power of conferring degrees in law. This recommendation had no effect. Some twenty years later, under the leadership of Lord Selborne, an attempt was made

to bring about the establishment of a general school of law in London by the action of Parliament. But the attempt was unsuccessful. Finally, six years ago, a third Parliamentary Commission reported in favor of a Faculty of Law in the proposed teaching University of London. And there the matter rests, although Lord Russell has recently expressed the hope "that the effort may once more be made, and this time successfully made, to establish what Westbury and Selborne hoped and worked for, a great school of law."

As a result of the agitation of the last sixty years, six readers and four assistant readers give some thirty hours of legal instruction per week throughout the year, and only those may be called to the bar who have passed successfully certain examinations. These examinations represent about one-third of the work covered by those of the Law School of the University of Pennsylvania, and, in the opinion of competent judges, do not afford any trustworthy test of adequate knowledge of the law. No attendance is required at the readers' lectures or classes, and the actual attendance is small. There is no permanent teaching staff. The teachers are appointed for a term of three years. They may or may not be reappointed. Incredible as it may appear, at the end of their term, in 1898, the ten readers and assistant readers were all dropped and replaced by a wholly new decemvirate. The reason for this clean sweep is almost more surprising than the change itself. The Council of Legal Education, as one of the members informed Lord Russell, "thought if they did not effect frequent changes, and thus permitted the idea to grow up that the teachers should be continued in office so long as they did their work well, it would be interfering with them in the pursuit of their profession, and it would be unfair to remove them later." Lord Russell, in criticising this novel conception of a professorial staff, says truly that "such a policy renders it impossible to look to the creation of an experienced professional class of teachers." There is obviously a wide gap between this school of the Inns of Court and the leading law schools in this country with a three years course, compulsory attendance, searching annual examinations, and a faculty of permanent professors.

One naturally asks, Why did not the universities assume the work of legal education which the Inns of Court abandoned? The answer is simple. The traditions of centuries were against such an innovation. It is true that the Vinerian professorship of the Common Law, to which we owe the world renowned Commentaries of Blackstone, was established at Oxford in the middle of the last century, and this was followed some forty years later by the similar Downing professorship at Cambridge. But only within the last thirty years has really valuable work been accomplished at the universities by a body of competent and permanent teachers. Even now the department of law at Oxford and Cambridge is not and does not claim to be a professional school. A large part of the curriculum is devoted to Roman Law, Jurisprudence and International Law, and a large majority of those who take the law course are undergraduates who propose to take their B. A. degree in law. Mr. Raleigh, one time Vinerian Reader in English Law, tells us that the best men at Oxford seldom begin the study of law until they go to London, and he thinks, in common with many others, that the ancient universities committed a grave mistake when they placed law among the subjects that qualify for the degree of B. A.

I regret to find that Sir Frederick Pollock considers this mistake irrevocable. American law professors would generally agree that a college student had better let law alone until he has completed his undergraduate course. Until the law course is made exclusively a post-graduate course, and Roman Law, Jurisprudence and International Law are made electives in the third year of the curriculum, instead of required subjects of the first year, and the staff of permanent professors materially enlarged, those of us who would like to see a strong professional school of law at the English universities, are not likely to have our dreams realized.

There must be, of course, some sufficient reason why, notwithstanding the recommendations of successive Parliamentary Commissions, and the earnest efforts of men like Lord Westbury, Lord Selborne and Lord Russell, so little progress has been made, either in London or at Oxford or Cambridge, towards the establishment of a law school com-

parable to the best schools in other countries. A distinguished lawyer of this city suggested, many years ago, the quaint explanation that in a country in which the law consists of the decisions of the judges, "it might be politic not to encourage academic schools of the national jurisprudence lest ambitious professors and bold commentators should obtrude their private opinions, and instil doubts into the minds of the youth." The true explanation, it is believed, is that which was suggested by another eminent Philadelphia lawyer. Mr. Samuel Dickson, to whom we have had the pleasure of listening to-day, in his interesting address at the opening session of this school eight years ago, pointed out that no public inconvenience was felt from the calling to the bar of gentlemen who were incompetent or unwilling to practice. For the barristers being engaged, under the English custom, not by the clients, but by the attorneys or solicitors, who were themselves experienced in law, the ignorant or incompetent barristers had no chance of obtaining any business, and dropped out of sight. Furthermore, the concentration of the entire body of barristers in London, and the unrivaled honors and emoluments that rewarded the successful lawyer so developed competition and so stimulated the ambition of the ablest men, as inevitably to produce a bench and bar of the highest merit and distinction.

If we turn now to this country, we find a marked contrast with the English experience in legal education. To the College of William and Mary, in Virginia, belongs the distinction of having the earliest law professorship in the United States, a distinction due to the fertile genius of Jefferson, who, being appointed visitor to the college in 1779, wrote to a friend, in a tone of great satisfaction, that he had succeeded in abolishing the two professorships of divinity and substituting two others, one of medicine and one of law and police. Judge George Wythe, commonly known as Chancellor Wythe, was appointed professor, doubtless through the influence of Jefferson, who had been a pupil in his office. It is an interesting fact that John Marshall, as a student of the college, attended the first course of lectures given by the first American law professor. Three similar professorships were established in the last century, at Philadelphia, New York, and Lexington, Ky. It

seems probable that these professorships were created with the hope that they would soon expand into university schools of law. Such an inference derives support from the high character of the first incumbents. Professor Wythe was a distinguished judge of the high Court of Chancery of Virginia, Professor Wilson, at Philadelphia, was an Associate Justice of the Supreme Court of the United States, and both were signers of the Declaration of Independence. Professor Kent, though a young man when first appointed, already ranked as a lawyer of exceptional ability and legal learning. To these honored names should be added that of Henry Clay, who, although the fact seems to have escaped his biographers, was for two years professor of law at Transylvania University, being the youngest full law professor, as well as the youngest senator, in our country's history. But the hopes that may have been entertained of developing schools of law out of these professorships were in the main doomed to disappointment. The private law school at Litchfield had for nearly twenty-five years no competitor, and throughout the fifty years of its existence was the only school that could claim a national character.

The oldest of the now existing law schools in this country is the school at Cambridge, which was organized in 1817. But for the first dozen years of its existence, the Harvard School was a languishing local institution. I cannot better present to you the gloomy outlook for this school at that time than by quoting from Provost Duponceau. In an address before the Philadelphia Law Academy in 1821, he advocated earnestly the establishment in Philadelphia of a National School of Law, and after alluding to the law lectures at the University of Cambridge, added: "If that justly celebrated University were situated elsewhere than in one of the remote parts of our union, there would be no need perhaps, of looking to this city for the completion of the object which we have in view. Their own sagacity would suggest to them the necessity of appointing additional professors, and thus under their hands would gradually rise a noble temple dedicated to the study of our national jurisprudence. But their local situation precludes every such hope." Nor were the law schools of the University of Maryland,

Yale and the University of Virginia, which were established between 1824 and 1826, in any sense rivals of the Litchfield School. At the termination of that famous private school in 1833, there were only about 150 students at seven university law schools. In the dozen years following, new schools were organized, and the school at Cambridge under the leadership of Story, in spite of its unfortunate situation, became a national institution. In 1850, when the Law School of the University of Pennsylvania was established by the auspicious election of Judge Sharswood as Professor of Law, our schools numbered fourteen, and in 1860 the number had risen to twenty-three, with a total attendance of about 1000 students, all but one of these schools forming a department of some university. In the thirty-five years since the Civil War more than eighty new schools have been organized, so that we have to-day 105 law schools, with an attendance of about 13,000 students. Twenty-five years ago in none of the schools did the course exceed two years. To-day, fifty of the schools have a three years' course. Nearly ninety of these schools are departments of a university.

Valuable as the lawyer's office is and must always be for learning the art of practice, these figures show how completely it has been superseded by the law school as a place for acquiring familiarity with the principles of law.

It is an interesting illustration of the law of evolution that we Americans, starting from radically different traditions of legal education, by a wholly independent process, without any imitation of continental ideas, have adopted in substance the continental practice of university legal training.

What is the significance for the future of this remarkable growth of law schools? It means first of all the opening of a new career in the legal profession, the career of the law professor. This is a very ancient career in countries in which the Civil Law prevails. In Germany, for instance, a young man upon completing his law studies at the university, determines whether he will be a practicing lawyer, a judge or professor, and shapes his subsequent course accordingly. The law faculties are, therefore, rarely recruited from either practicing lawyers or judges. This custom will never, I trust, prevail in

this country. Several of my colleagues at Cambridge think that a law faculty made up in about equal proportions of men appointed soon after receiving their law degree, and of men appointed after an experience of from ten to twenty years in practice or upon the bench would give the best obtainable results. I should be willing to take the chances of a somewhat larger proportion of the younger men, if I believed them to have the making of eminent counselors or strong judges ; and, surely, men lacking these qualifications ought never to be thought of as permanent teachers in a first-class law school. The experience of the new law school at Leland Stanford University may fairly be expected to throw light on this problem. Next year, four of the five law professors in that school will be men who received their appointments within two years after taking their degree in law. They all graduated with distinction, and might look forward with confidence to a successful career at the bar or on the bench. I venture the prediction that this California school will ere long be in the front rank of American law schools. One of their faculty told me that their ambition was to make the Stanford Law School better than the best Eastern law schools, and added, with commendable enthusiasm, that he believed they would succeed within twenty-five years. May God speed them to their goal !

But whatever question there may be as to the just proportion in a law faculty of professors from the forum and from the university, there ought to be no doubt that the faculty should be made up almost wholly of men who devote the whole of their time to the university. The work of a law professor is strenuous enough to tax the energies of the most vigorous and demands an undivided allegiance.

At the present time about one-fourth of the law professors of this country give themselves wholly to the duties of their professorships, while three-fourths of them are active in practice or upon the bench. These proportions ought to be, and are likely to be, reversed in the next generation. At the law schools of Harvard, Columbia, University of Virginia, Washington and Lee, Cornell, Stanford and as many more, nearly all the professors give themselves exclusively to the aca-

demical life. The University of Pennsylvania, I am confident, will not be long in joining this group. There are, of course, occasional instances of men of exceptional ability, facility and capacity for work, and of such abundant loyalty—I need not go beyond the walls of this building for illustrations—from whom it is better to accept the half loaf that they are ready to give, than the whole loaf of the next best obtainable persons. There is always the hope, too, that such men may, sooner or later, cast in their lot for good and all with the university. But it is a sound general rule that a law professorship should be regarded as a vocation and not an avocation.

Of this vocation the paramount duty is, of course, that of teaching. Having mastered his subject, the professor must consider how best he can help the students to master it also. Different methods have prevailed at different times and places. At the Litchfield School, Judge Reeve and Judge Gould divided the law into forty-eight titles and prepared written lectures on these titles which they delivered, or rather dictated, to the students, who took as accurate notes as possible, which they afterwards filled out and copied for preservation. A set of these notes, filling three quarto volumes of about five hundred pages each, was presented to the Harvard Law Library. The donor in his letter accompanying the gift wrote that these notes were so highly prized when he was a student at Litchfield that \$100 and upwards were frequently paid for a set. At a time when there were very few legal treatises, this plan of supplying the students with manuscript text-books served a useful purpose. But with the multiplication of printed treatises, instruction by the written lecture, which Judge Story, as far back as 1843, characterized as inadequate, has been rightly superseded. The recitation or text-book method was for many years the prevailing method, and is still much used. A certain number of pages in a given text-book are assigned to the students, which they are expected to read before coming to the lecture room. The professor catechises them upon these pages, and comments upon them, criticising, amplifying and illustrating the text according to his judgment. In the hands of a master of exposition, who has also the gift of provoking discussion by putting hypothetical cases, this method will

accomplish valuable results. But the fundamental criticism to be made upon the recitation method of instruction, as generally handled, is that it is not a virile system. It treats the student not as a man, but as a schoolboy reciting his lesson. Any young man who is old enough and clever enough to study law at all, is old enough to study it in the same spirit and the same manner in which a lawyer or judge seeks to arrive at the legal principle involved in an actual litigation. The notion that there is one law for the student and another law for the mature lawyer is a pure fallacy. When thirty years ago Professor Langdell introduced the inductive method of studying law, it was my good fortune to be in his first class at the Harvard Law School, so that we had an opportunity to compare his method with the recitation system. We were plunged into his collection of cases on Contracts, and were made to feel from the outset that we were his fellow students, all seeking to work out by discussion the true principle at the bottom of the cases. We very soon came to have definite convictions, which we were prepared to maintain stoutly on legal grounds, and we were possessed with a spirit of enthusiasm for our work in Contracts, which was sadly lacking in the other courses conducted on the recitation plan.

There are some very suggestive sentences in Lord Chief Baron Kelly's testimony before the Parliamentary Commission of 1855. He was giving his reasons, derived from his own experience, for setting a much higher value upon the experience in the chamber of a barrister or special pleader than upon courses of lectures. "Perhaps," he says, "there was too much copying. But there was also this—there were constant debates, there were constant investigations of every case that came into the barrister's or pleader's chambers for his opinion, and looking up of cases; and then the students, each giving his own opinion upon the case, and saying why he formed that opinion, by referring to authorities; and then the barrister saying, my opinion is so and so, upon such and such grounds, correcting the errors of the one student, and approving of the course resorted to by the other. That was the way in which I learned the law, together with reading; and if I am to compel anybody to go through any course at all, it would

be just that course." The Lord Chief Baron was exceptionally fortunate in his student experience. He was in truth at a private law school conducted on the sound principle of developing the student's powers of legal reasoning by continual discussion of the principles involved in actual cases. With the extinction of the special pleader there are few such schools left, even in London, and none at all in this country. One of my colleagues has said that if a lawyer's office were conducted purely in the interest of the student, and if, by some magician's power, the lawyer could command an unfailing supply of clients with all sorts of cases, and could so order the coming of these clients as one would arrange the topics of a scientific law-book, we should have the law-student's paradise. This fanciful suggestion was made with a view of showing how close an approximation to this dream of perfection we may actually make. If we cannot summon at will the living clients, we can put at the service of the students, and in a place created and carried on especially for their benefit, the adjudicated cases of the multitude of clients who have had their day in court. We have only to turn to the reported instances of past litigation, and we may so arrange these cases by subjects and in the order of time as to enable us to trace the genesis and the development of legal doctrines. If it be the professor's object that his students shall be able to discriminate between the relevant and the irrelevant facts of a case, to draw just distinctions between things apparently similar, and to discover true analogies between things apparently dissimilar, in a word that they shall be sound legal thinkers, competent to grapple with new problems because of their experience in mastering old ones, I know of no better course for him to pursue than to travel with his class through a wisely chosen collection of cases. These "constant debates" in the class have a further advantage. They make easy and natural the growth of the custom of private talks and discussions between professor and students outside of the lecture rooms. Any one who has watched the working of this custom knows how much it increases the usefulness of the professor and the effectiveness of the school.

But the field of the law-professor's activity is not limited to

his relations with the students, either in or out of the classroom. His position gives him an exceptional opportunity to exert a wholesome influence upon the development of the law by his writings. If we turn to the countries in which the vocation of the law-professor has long been recognized, to Germany, for instance, we find a large body of legal literature, of a high quality, the best and the greater part of which is the work of professors. The names of Savigny, Windscheid, Ihering and Brunner at once suggest themselves. These and many others are the lights of the legal profession in Germany. The influence of their opinions in the courts is as great or even greater than that of judicial precedents. Indeed, to our way of thinking, too much regard is paid to the opinions of writers and too little to judicial precedents, with the unfortunate result that the distinction of the continental judges is far less than that of the English judiciary. The members of the court do not deliver their opinions *seriatim*, nor does one judge deliver his written opinion as that of the court. The opinions are all what we call *per curiam* opinions. Furthermore, one may search the reports from cover to cover, and not be able to find the number or the names of the judges who constitute the highest court in the German Empire.

But, while the Germans might well ponder upon the splendid record and position of the judges in England and in the best courts in this country, we, on the other hand, have much to learn from them in the matter of legal literature. Some of our law books would rank with the best in any country, but as a class our treatises are distinctly poor. The explanation for this is to be found, I think, in the absence of a large professorial class. We now at last have such a class, and the opportunity for great achievements in legal authorship is most propitious. Doubtless no single book will ever win the success of the Commentaries of Blackstone or Kent. And no single professor will ever repeat the marvelous fecundity of Story, who, in the sixteen years of his professorship, being also all those years on the bench of the Supreme Court, wrote ten treatises of fourteen volumes, and thirteen revisions of these treatises. We live in the era of specialization, and the time has now come for the intensive cultivation of the

field of law. The enormous increase in the variety and complexity of human relations, the multiplication of law reports, and the modern spirit of historical research, demand for the making of a first-class book on a single branch of the law an amount of time and thought that a judge or lawyer in active practice can almost never give. The professor, on the other hand, while dealing with his subject in the lecture room, is working in the direct line of his intended book, and if he teaches by the method of discussion of reported cases, he has the best possible safeguard against unsound generalizations; for no ill-considered theory, no doctrinaire tendency can successfully run the gauntlet of keen questions from a body of alert and able young men encouraged and eager to get at the root of the matter. He has also in his successive classes the gratuitous services of a large number of unwitting collaborators. For every one who has ever written on a subject, which has been threshed out by such classroom discussion, will cordially agree with these words of the late Master of Balliol: "Such students are the wings of their teacher; they seem to know more than they ever learn; they clothe the bare and fragmentary thought in the brightness of their own mind. Their questions suggest new thoughts to him, and he appears to derive from them as much or more than he imparts to them."

Under these favoring conditions the next twenty-five years ought to give us a high order of treatises on all the important branches of the law, exhibiting the historical development of the subject and containing sound conclusions based upon scientific analysis. We may then expect an adequate history of our law supplementing the admirable beginning made by the monumental work of Pollock and Maitland.

But the chief value of this new order of legal literature will be found in its power to correct what I conceive to be the principal defect in the generally admirable work of the judges. It is the function of the law to work out in terms of legal principle the rules, which will give the utmost possible effect to the legitimate needs and purposes of men in their various activities. Too often the just expectations of men are thwarted by the action of the courts, a result largely due to taking a

partial view of the subject, or to a failure to grasp the original development and true significance of the rule which is made the basis of the decision. Lord Holt's unfortunate controversy with the merchants of Lombard street is a conspicuous instance of this sort of judicial error. When, again, the Exchequer Chamber denied the quality of negotiability to a note made payable to the treasurer for the time being of an unincorporated company, they defeated an admirable mercantile contrivance for avoiding the inconvenience of notes payable to an unchartered company or to a particular person as trustee. Both mistakes were due to a misconception of the true principle of negotiability and both were remedied by legislation. It would be difficult to find an established rule of law more repugnant to the views of business men or more vigorously condemned by the courts that apply it, than the rule that a creditor who accepts part of his debt in satisfaction of the whole, may safely disregard his agreement and collect the rest of the debt from his debtor. This unfortunate rule is the result of misunderstanding a *dictum* of Coke. In truth, Coke, in an overlooked case, declared in unmistakable terms the legal validity of the creditor's agreement. In suggesting these illustrations of occasional conflict between judicial decisions and the legitimate interests of merchants I would not be understood as reflecting upon the work of the judges. Far from it. The marvel is that in dealing with the many and varied problems that come before them, very often without any adequate help from the books, so few mistakes are made. From the nature of the case the judge cannot be expected to engage in original historical investigations, nor can he approach the case before him from the point of view of one who has made a minute and comprehensive examination of the branch of the law of which the question to be decided forms a part. The judge is not and ought not to be a specialist. But it is his right, of which he has too long been deprived, to have the benefit of the conclusions of specialists or professors, whose writings represent years of study and reflection, and are illuminated by the light of history, analysis and the comparison of the laws of different countries. The judge may or may not accept the conclusions of the professor, as he may

accept or reject the arguments of counsel. But that the treatises of the professors will be of a quality to render invaluable service to the judge and that they are destined to exercise a great influence in the further development of our law, must be clear to every thoughtful lawyer.

It is the part of a professor, as well as of a judge, to enlarge his jurisdiction. Mention should, therefore, be made of the wholesome influence which the professor may exert as an expert counselor in legislation, either by staying or guiding the hand of the legislator.

The necessity of some legislation to supplement the work of the judges, and the wisdom of many statutory changes will be admitted by all. But the power of legislation is a dangerous weapon. Every lawyer can recall many instances of unintelligent, mischievous tampering with established rules of law. One of the worst of such instances is the provision in the New York Revised Statutes of 1828, which changed radically the rule against perpetuities, and which called forth Professor Gray's criticism "that in no civilized country is the making of a will so delicate an operation and so likely to fail of success as in New York." Equally severe criticism may be fairly made upon the revolutionary legislation in the same state, in 1830, in regard to the law of trusts. This new legislation has produced several thousand reported cases and has given to New York a system of trusts of so provincial a character, that, in the opinion of Mr. Chaplin, the author of a valuable work on trusts, the ordinary treatises on that subject are deprived of much of their value for local use. A part of this provincial system worked so disastrously, and caused, as Chief Justice Parker has said in a recent opinion, so many "wrecks of original charities—charities that were dear to the hearts of their would-be founders, and the execution of which would have been of inestimable value to the public," that it was at last abolished and the English system of charitable trusts restored. No one will be so rash as to regard the law professor as a panacea against the evils of unwise legislation. But I know of no better safeguard against such evils than the existence of a permanent body of teachers devoting themselves year after year to the mastery of their respective subjects.

Then again the spirit of codification is abroad. It is devoutly to be wished that this spirit may be held in check, until we have a body of legal literature resting upon sound generalizations. If, however, codification must come prematurely, it is the part of wisdom to bring to the work the best expert knowledge in the country. The commission to draft the code should be composed of competent judges, lawyers and professors, and, in the case of commercial subjects, business men of wide experience. The draft of the proposed code should be published in a form easily accessible to any one, and the freest criticism through legal periodicals or otherwise should be invited during several years. In the light of this criticism the draft should then be amended and revised. In Germany, where by far the best of modern codification is to be found, these cardinal principles are followed as a matter of course. They were almost completely ignored, and with very unfortunate results, in the preparation of the Negotiable Instruments Act, adopted by several of our states. We should surely mend our ways in future codifications. In Germany much of the best work in the drafting of the code and of the criticism of the draft is done by the professors. There is no reason why under similar methods the same might not be true in this country.

This, then, is the threefold vocation of the law professor—teacher, writer, expert counselor in legislation. Surely, a career offering a wide scope for the most strenuous mental activity, a stimulus to the highest intellectual ambition, and gratifying in abundant measure the desire to render high service to one's fellow-men. If the professor renounces the joy of the arena, and the intellectual and moral glow of triumphant vindication of the right in the actual drama of life, he has the zest of the hunter in the pursuit of legal doctrines to their source, he has that delight, the highest of purely intellectual delights, which comes when, after many vigils, some original generalization, illuminating and simplifying the law, first flashes through his brain, and better than all, he has the constant inspiration of the belief that through the students that go forth from his teaching and by his writings, he may leave his impress for good upon that system of law which, as Lord

Russell has well said, "is, take it for all in all, the noblest system of law the world has ever seen."

To those of us who believe that upon the maintenance and wise administration of this system of law rests more than upon any other support the stability of our government, it is a happy omen that so many centres of legal learning are developing at the universities all over our land. May the lawyers and the university authorities see to it that these law faculties are filled with picked men. Until the rural legislator has enlightened views of the value of intellectual service, we cannot hope to have on the bench so many of the ablest lawyers as ought to be there. But the universities, many of them at least, are not hampered by this difficulty. They have it in their power to add to the inherent attractiveness of the professor's chair such emoluments as will draw to the law faculty the best legal talent of the country. I have the faith to believe that at no distant day there will be at each of the leading university law schools, a body of law professors of distinguished ability, of national and international influence. That the Law School of this University will have its place among the leaders is assured, beyond peradventure, by the dedication of this building. The lawyers of future generations, as they walk through these spacious halls, and see this rich library, and the reading-rooms thronged with young men working in the spirit of enthusiastic comradeship, will say: "Truly it was a noble nursery of justice and liberty that the lawyers and citizens of Philadelphia erected in 1900"—but as they call to mind the distinguished lawyers and judges among the alumni, and as they read over the names of the jurisconsults on the professorial staff, men teaching in the grand manner, and adding lustre by their writings to the University and to the legal profession they shall add. "But those men of Philadelphia builded even better than they knew."

James Barr Ames.

THE CONSTITUTIONAL RELATIONS OF ENGLAND AND HER DEPENDENCIES.

According to the last official statistics published by the Colonial Office, the Colonial Empire of Great Britain—excluding Great Britain itself and India—extended over some 9,750,000 of square miles, with an estimated population of between 23,000,000 and 24,000,000—the distribution of which is thus summarized :

Countries.	Area (Sq. Miles).	Population.
Europe	3,700	427,000
Asia	124,000	5,279,000
Africa	2,515,000	5,304,000
America	3,958,000	5,733,000
West Indies	12,000	1,514,000
Australasia	3,175,000	4,926,000
Total	9,797,700	23,283,000

If we add to these figures,

The United Kingdom	121,180	40,000,000
India	1,560,110	289,000,000

the total area and population under the Crown of England will be nearly 11,500,000 square miles with some 350,000,000 of inhabitants.

It would be impossible to say, without a very elaborate examination of statistics, what proportion of the above area and population can really be regarded as British. But speaking roughly we may say that Canada, Australasia, and a great part of the Cape of Good Hope are true British colonies in the sense that the bulk of the population is of British descent, with English law for their personal law, and that they may be expected to expand into great English-speaking nations. Of course a considerable number of persons of pure British descent are to be found in the other parts of the empire, but for purposes of enumeration they may be set off against the non-British in the British colonies proper. The latter would, on this calculation, contain an area of some 7,000,000 or 7,500,000 square miles, and a population of about 12,000,000.

I will not attempt to give any detailed account of how this great empire has been built up. Part of it was acquired by conquest—or as the result of wars—but it is to the peaceful

industry and enterprise and natural aptitude for colonization of her sons that England owes the greater part of her colonial empire. The foundation of this empire was laid by the acquisition of Newfoundland in 1583—and the last act of expansion was the arrangement with other European Powers of 1890 by which England acquired, or was acknowledged to have the right to acquire, some 2,500,000 out of the 11,000,000 of square miles which is the estimated area of the whole of Africa.

The formal constitutional relations between England and her colonies and dependencies is the same for all in the sense that all form part of the dominions of the Crown, and are, in theory, governed by the Crown through the colonial secretary, the history of whose office is briefly this :

In July, 1660, the management of the affairs of the colonies was entrusted to a committee of the Privy Council, which, in the following December, became the Council of Foreign Plantations. This, in 1672, was united to the Council of Trade, and the joint body was styled the Council of Trade and Plantations. It was suppressed in 1677, but revived in 1695, and continued to exist down to 1782. In 1768, when the unfortunate quarrel between England and her American colonies had commenced, a secretary of state for the colonies was for the first time appointed. But both he and the council were abolished in 1782, when the quarrel ended in the complete loss of America, and the affairs of the colonies that remained to us were again made over to a committee of the Privy Council. This committee was formally constituted in 1786 and subsequently developed into what is now known as the Board of Trade, but after the outbreak of the French War in 1793, the committee ceased to have anything to do with colonial affairs. These were first made over to the Home and then to the War Office, and in 1801 a new office of secretary of state for war and the colonies was created. This arrangement continued till 1854, when the outbreak of the Crimean War, as well as the rapid growth of the Australian colonies necessitated a separation of the two offices. Since then the secretary of state for the colonies has had sole charge of their affairs.

But although the colonies and dependencies are alike in so

far as they are, in theory, governed by the Crown through the colonial secretary, their real government presents every variety of constitutional relations, from complete dependence to practical independence. Apart from mere posts occupied for naval or military purposes, such as Gibraltar, Adeb, Perim, and Wai-o-Wai, which are under the Admiralty or War Office, or the government of India, and "protectorates" or "spheres of influence," such as Uganda, Zanzibar, the Niger Coast, and the North Borneo Company, which are under the Foreign Office, there are under the Colonial Office forty distinct and, as regards each other, independent governments or administrations. Of these forty, eleven are what is called "self-governing colonies," *i. e.*, practically independent governments with parliaments of their own. The remaining twenty-nine may be grouped as follows :

- I. Without any Legislative Council, that is, where the power of legislation is vested in the officer administering the government 4
 These may be subdivided into—
 - (a) Where the Crown has reserved to itself the power of legislating by order in council.
 Malta, Labuan, St. Helena 3
 - (b) Where it has not reserved this power. Basutoland 1
- II. With Legislative Councils nominated by the Crown, 16
 - (a) In which the Crown has reserved the power of legislating by order in council 15
 - (b) Where it has not reserved this power . . . 1
- III. With Legislative Councils, partly nominated by the Crown and partly elected 9
 - (a) In which the Crown has reserved the power of legislating by order in council 6
 - (b) In which it has not reserved the power . . . 3

In the case of all these twenty-nine colonies or dependencies the control of the Crown is a real control. Where there is no Legislative Council the officer administering the government acts entirely under instructions received from Home. In the others the case is the same in all executive matters, and

even where the Legislative Council contains the largest elected proportion of members, its powers of legislation are by no means complete, that is to say the colonial secretary, even when he does not require bills to be submitted to him for approval before they are introduced into council, would not hesitate to advise the Crown to veto any bill passed by the council which he considered objectionable.

But in the eleven "self-governing" colonies the case is very different. They too, as I have said, are in theory, and by their written constitutions, so far as they have any, governed by the Crown through the colonial secretary. The administration is carried on in the name of a governor appointed by the Crown, through ministers whom he may choose and dismiss at pleasure, and he may veto the most deliberate acts of the legislature. But what we now understand in England by the term "constitution" is not the letter of documents (of which there are hardly any) creating, or defining the powers of any part of the body politic, but the general spirit in which custom, which has from time to time changed, and will continue to change, expects each different part to exercise its powers. Lord Macaulay, in the opening chapter of his *History of England*, says with reference to the constitution :

"The change, great as it is, which her (England's) polity has undergone during the last six centuries has been the effect of gradual development, not of demolition and reconstruction. The present constitution of our country is to the constitution under which she flourished 500 years ago, what the tree is to the sapling, what the man is to the boy. The alteration has been great, yet there never was a moment at which the chief part of what existed was not old. A polity thus formed must abound in anomalies, but for the evils arising from mere anomalies we have ample compensation. Other societies possess written constitutions more symmetrical. But no other society has yet succeeded in uniting revolution with prescription, progress with stability, the energy of youth with the majesty of immemorial antiquity."

Thus it is that whilst the constitution of England at the present day is practically a democracy, in the sense that the will of the people as expressed through a House of Commons

elected on a very broad suffrage, is really the supreme power in the state, the sovereign retains not only the titles, but also, in theory, the powers of the Tudor and Stuart monarchs, and the House of Lords has at least the same power as the House of Commons. Yet if either the Crown or the House of Lords were to attempt to exercise their powers in opposition to the House of Commons their conduct would be denounced as "unconstitutional," not because it would be a breach of letter of the constitution, but because it has become a recognized principle that the Crown can only act on the advice of responsible ministers and that the House of Lords, though it may and should reject hastily considered measures, or measures as to the expediency of which the opinion of the nation is divided, is not justified in opposing a deliberate and definite expression of the national will.

A similar spirit pervades the constitution of the self-governing colonies with reference both to their internal government and their relation to the mother country. I will not attempt to trace the history of these colonies, or of any of them, in detail, or to explain the technicalities of their existing constitutions. Speaking broadly, it is as true of them as of the English constitution, that the present state of things is the result of natural development. In its early days the head of a colony must have full powers, and these must be derived from the Crown, that is the responsible government of the mother country, and be exercised under the control of the Crown. When the colony begins to gain strength, its leading men may be selected to assist the governor with their advice and share his powers, and the control of the Crown will be relaxed. As the strength of the colony increases, the nominated council may give place to an elected one, and the control of the Crown reduced to a minimum. This is the stage which has been reached by the "self-governing colonies," and, as I have said, it has been reached gradually, not by blindly adopting a particular form of government on account of its theoretical beauty, but by from time to time applying the form most suitable to the circumstances of each particular case. There is a great danger in political (of course I do not use the word in its party sense) as well as in other

matters—not excluding even the law, of following theories instead of attending to the facts. This danger is particularly great when a country whose government is based on a democratic, or popular, foundation is dealing with the affairs of a colony or dependency. Because certain arrangements, such as the practical vesting of supreme power in a popular assembly, trial by jury, liberty of the press, work well, or are a necessity in the mother country, it is assumed that they are great and eternal truths which will work equally well in all communities, and that they must be applied regardless of consequences, even though popular elections may result in a war of races, or chaos, trial by jury in gross miscarriage of justice, and liberty of the press, in anarchy. The true democratic or popular principle is, I believe, this, that all governments exist, or should exist, for the good of the governed, and that the best form of government for every community is the one which is under the particular condition of each case most calculated to promote this good. The relations between a mother country and her colonies and dependencies resemble very closely those between a parent and child. If it is incumbent on the parent to protect and control a child in its infancy it is equally incumbent on him to recognize the fact that the child grows into the man, and that as he does so, advice must take the place of command, and at last even advice must not be obtruded unasked. I do not wish to refer to any of the details of what I have already spoken of as the unfortunate quarrel between England and her American colonies, but I think that it may be said with truth that the chief cause of it was England's failure to recognize the fact that her child had grown up. She has learned a lesson from the past, and whatever may be the formal constitutional relations between England and her grown-up colonies, the real tie between them is that of family affection. The value of such a tie is as great in public as in private life, and it was never more strongly shown than at the present moment, when from all parts of the empire England's children are rallying to her side, ready to spend their money and their lives in her defence, each colony vying with the others as to which can do most for the common mother, and best serve their much-loved Queen.

To the very brief sketch which I have attempted to give of the constitutional relations between England and her colonies, I must add a few words regarding these relations between her and India. India is not, and never can be a colony, that is, a country occupied to any appreciable extent by settlers of British descent. Its organization, social and political, is entirely its own, though its government is completely controlled by England. It is the greatest of England's "dependencies," and a most perfect illustration of the true meaning of the term. Although India is often described as having been conquered, or acquired by the sword, the description is very inaccurate. The real source of the acquisition was, as in the case of the colonies—the peaceful industry and enterprise of England's own children. The foundation of the empire was a curious one—it was due to a rise in the price of pepper. The Dutch who had a monopoly of the Eastern trade, raised the price of all spices to such an extent, that in 1600 a few merchants of the city of London determined to send out one or two ships of their own. Their enterprise was successful, it was repeated, and developed into a regular trade. The merchants became a chartered company, with a monopoly and established depots, or factories. Bombay came to England as part of the dowry of the Queen of Charles II. Madras was founded in 1664 and Calcutta in 1698. The factories grew into possessions, and their guards into a powerful army. Clive made these possessions a power, and Warren Hastings made this power an empire, of which he was made governor-general in 1774. It was Pitt's Regulating Act of that year which first established any real constitutional relations between England and India. This was done by constituting England a committee of the East Indian Company's directors, presided over by a cabinet minister, called the "president of the board of control," for the management of the "political" affairs of the company, by associating with the governor-general members of council appointed from home, and by establishing at each presidency town, that is at Calcutta, Madras and Bombay, a supreme court whose judges were English barristers. This arrangement lasted till 1860, when the East India Company ceased to exist, and the Crown assumed the direct government of India.

But the organization of the new government was framed, in the main, on the lines of the old one. In England a secretary of state took the place of the old "president of the board of control," and his council, varying in number from ten to fifteen, and composed of persons, official and non-official, of the greatest Indian experience, took the place of the old company's committee. The secretary of state cannot impose any burden on the finances of India without the consent of his council, and he is supposed to consult it and be guided by its advice in all other matters. But he may, and he not infrequently does, act independently of his council, or disregard its advice, not, I fear, always to the benefit of India.

In India the governor-general became also viceroy, but his powers and those of his executive council, which consists of a legal member and a financial member, usually sent out from England, and a military member, and two civilians selected from the civil and military services in India, remained much as before. Each member of council has special charge of some department of the government, and, like a cabinet minister in other countries, disposes of all minor matters connected with it. All matters of importance are dealt with by the whole council, but the viceroy is not bound by a vote of the majority, nor would a member who was outvoted think it necessary to resign. He would merely record a minute setting forth his reasons for dissenting from the policy adopted. No doubt the original intention of the framers of this constitution was that the opinion of the members of council should be given perfectly independently by them as Indian experts, that the viceroy should also form an independent judgment after giving due weight to this opinion, and that the secretary of state in England should only overrule the viceroy for very special reasons. I would not imply that the members of the council have ceased to give independent opinions, and they have most carefully kept themselves free from English political parties. But the course of events in India and its vicinity, which has made many Indian questions English or European questions, and more especially the telegraphic connection between India and England, has tended to reduce the government of India to a more subordinate position, and to make its

highest officers not men left to act independently with a possibility of having their action set aside, but mere officials appointed to carry out orders or a policy resolved on at home.

A very erroneous ideal prevails about the government of India and its officers in matters of internal administration. It is very generally supposed that the executive government and its officials down even to its district officers can issue what orders they please, and that these orders have the force of law. Nothing can be further from the truth. No doubt this was the state of things under the native governments which preceded the British, and it continues, with certain reservations, in the native states at the present day. But in British India the powers of the government and its officers were created solely by the written law, and are strictly limited by it. There is no royal prerogative by common law, and no inherent power in any class or any individual to rule over others. The whole population is on a footing of the most perfect legal equality, and if any one issues an order to another he must show that the power to do so was conferred on him by a certain section of a certain act, either of parliament or the Indian legislature, and punishment for disobedience of the order could only be inflicted by a regular court of law, after a proper trial. If the viceroy himself were to be personally assaulted by a common coolie, the latter would not, as in most Eastern countries, be led off to instant execution, he would have to be prosecuted before a magistrate, and could only, on conviction, receive the sentence prescribed by law.

No doubt in its inception the British Government did succeed to the powers of the government it displaced, and its executive orders were regarded as laws. But as soon as Pitt's Act of 1774 gave a definite shape to the constitution of India, the distinction was drawn between mere executive orders, and regulations by the governor-general in council which were drawn up in the form of statutes and were intended to be observed as laws. In 1833 a Legislative Council, consisting of the viceroy and his executive council, with the addition of other members, official and non-official, nominated by him, was created and the power of legislation was transferred to it

alone. Lord Macaulay went out to India as its first legal member of council, and the India Penal Code which, though it was not formally passed till 1860, was drafted by him, would even if he had written nothing else, remain forever a monument of his genius. The council was enlarged in 1861, and it has been further enlarged of late years, chiefly by the addition of non-official members, a few of whom are elected, or rather nominated to the viceroy for approval, by bodies such as the Calcutta Chamber of Commerce, and members have been given a right of interpellation. Some of these changes can hardly be regarded as improvements, and they were probably adopted merely in order to avoid still more mischievous ones. In its proper sphere, that is as a machine for passing laws, the council has done admirable work. In addition to the Penal Code to which I have referred, it has given us most complete codes of Civil and Criminal Procedure, and a "Contract Act" and an "Evidence Act," which embody the cream of English and American law. The ordinary process of legislation in India is this: Bills are introduced into council, not to satisfy some political cry or "fad," but to meet some real want which has been pressed on the notice of government. On their introduction they are not only published in the *Government Gazette* and leading newspapers, English and vernacular, but they are also specially sent for opinion to those persons, official and non-official, Europeans and natives, who are likely to have any opinion worth giving. The opinions received are carefully considered by a select committee of the council, who then report the bill to the council generally with their recommendations. It is then debated in the usual way and passed into law or rejected, as the case may be. To attempt to turn this body into a parliament or anything resembling a parliament, will considerably impair its efficiency as a machine for legislation as to any general establishment of parliamentary institutions in India. I can only repeat what I have already said as to the danger of applying theories without regard to facts. The natives of India who form themselves into congresses and pass resolutions, in no sense represent the people of India or express their true wants. They merely represent a somewhat

numerous body of persons who have received an English education at government expense, and who, on failing to obtain government employment, think that they will at least obtain notoriety by going into opposition. Their mode of thought and speech, and even of their sedition, when they are seditious, is not that of India but of an imitation Europe.

Between the Legislative Council and England the constitutional relation is that the council has full power to legislate on all matters within the limits of British India, and the Crown, acting through the secretary of state, has merely the power of veto. It was intended that all members of the council, official as well as non-official, should deal with all matters in a perfectly independent spirit, and that the power of veto should only be exercised in extreme cases. But, as in executive matters, there has been a tendency on the part of the secretary of state to encroach on the powers of the government of India. Under the cover of the power of the veto, he requires the more important measures of government to be submitted to him for approval before the bills to give effect to them are introduced into the council, and its official members are expected, though not to the same extent as in England, to support the bills that may thus be introduced.

Besides the power of control over the making of laws which I have endeavored to explain in the above remarks, there exists for all the colonies, self-governing or dependent, and for India, a very real control over the administration of the law, which is exercised by the Judicial Committee of the Privy Council. This body is the final court of appeal for all parts of the British Dominions outside the United Kingdom. Cases come before it from all quarters of the globe, and it has to act as the final interpreter of almost every known system of law, English, Colonial, Hindu and Mohammedan, and even the still more intricate systems of customary or tribal law, by which most of the native races are governed. Yet, strange to say, this supreme court is not, strictly speaking, a court at all. Its jurisdiction arises simply out of the right of every British subject, who believes that a wrong has been done him, to petition his sovereign personally for redress. Of course there are limits imposed by the various legislatures

as to the nature and value of the cases in which an appeal to Her Majesty in council is allowed, but when it is allowed it takes the form of a petition to the sovereign, which is referred by her to certain select members of her Privy Council for consideration. They consider it not as a bench of judges sitting in state, but as a small group of elderly gentlemen in plain clothes, seated at the end of an office table, and the result of their deliberations is recorded, not in the form of a decree of a court, but merely as "humble advice" to Her Majesty to take certain action. It is needless to say that Her Majesty always does act on the advice given, but the whole procedure is a curious illustration of the affection of the English constitution for old forms long after the substance has completely changed.

In concluding this brief sketch of the constitutional relations between England and her colonial empire, I cannot, in the presence of an American audience, refrain from giving expression to the thought, which must often occur to most Englishmen, what would that empire have been if you had continued to form part of it? In its mere external form it would have been an empire extending over more than 15,000,000 of square miles, and containing in addition to nearly 300,000,000 British subjects of other races, a population of 130,000,000 of English-speaking freemen, and its internal strength would have been greater even than its form. I have said that the chief cause of our losing you was that England failed to recognize when her child was grown up. It may be that the child was so strong and vigorous, and his future in life so great, that the most judicious treatment would have failed to permanently retain him even in a nominal dependence on his mother. If this is so, if we must have parted company some day, at any rate we need not have parted in anger. But time softens the bitterness of even the most serious family quarrels, and I think it may be truly said that in ours all sense of bitterness passed away a hundred years ago, and that the lesser feelings of jealousy and estrangement have gone also. Year by year the two great kindred nations are drawing closer and closer together, they are learning to understand one another better, to rejoice with each other in prosperity, to

sympathize with each other in trouble, to recognize the truth of the old saying that "blood is thicker than water," and to feel that we are not merely friends with interests and feelings in common, but are truly members of one family. When we come to you we receive even more than a family welcome, and when you come to us it is not to see a strange country, but to revisit your old home. Many of you, I am glad to say, visit Oxford in the course of your tours, and I have no doubt that, as you gaze on the old colleges and recall their founders and benefactors and the history of the times in which they lived, it is a pleasure to you to feel that this history is your history, that these men were your ancestors, and that you have as good a right to claim admission to the colleges as founder's kin as any inhabitant of the British Isles.

Sir Charles Arthur Roe.

Samuel Dickson, in presenting the building on behalf of the Trustees of the University to the Faculty of the Law Department, said:

"Mr. Provost: The first duty of the representative of the Trustees upon this occasion, is to acknowledge that it is to your courage and exertions we owe it that this building has been erected on this site, for no one else thought it possible to obtain a sum sufficient for the necessary expenditures; and it is equally imperative to say to you, Mr. Dean, that to the patient and intelligent supervision by yourself and colleagues, of every detail of arrangement, must be ascribed, in large measure, the perfect adaptation of the building, in all its parts, to the uses to which it is to be devoted.

Upon its formal dedication to the teaching of the law, every lawyer present will naturally recall the first lecture delivered in 1790 by James Wilson, one of the Associate Justices of the Supreme Court of the United States. Upon that occasion were present President Washington, members of his cabinet and of Congress, with Mrs. Washington and other ladies. The event was regarded as of the first importance, and it has continued to be so by reason of the course of lectures deliv-

ered during that and the following winter, for they constitute a distinct contribution to the literature of the law. His full course would have occupied three terms, but before its completion, he was appointed, in 1791, by the General Assembly of Pennsylvania, to revise and digest the laws of the Commonwealth, to ascertain and determine how far any acts of Parliament extended to it, and to prepare such bills as the new condition of things called for. This task involved great labor and diverted him from his duties as a professor, and he did not live to complete the work which would have anticipated the later collection of the British statutes by the Judges of the Supreme Court, and of the Commissioners subsequently appointed under the act of 1830. His lectures were also left in an unfinished condition, but those which were completed confirm the estimate placed upon his ability by the later writers and notably by Mr. Bryce, who speaks of him as one of the deepest thinkers and most exact reasoners among the members of the convention of 1787.

In his account of the prominent lawyers at the time of the Revolution, William Rawle, who knew him at the bar, in the splendor of his talents, and in the fulness of his practice, thus spoke of him: 'Wilson soon became conspicuous. The views which he took were luminous and comprehensive. His knowledge and information always appeared adequate to the highest subject, and justly administered to the particular aspect in which it was presented. His person and manner were dignified, his voice powerful, though not melodious, his cadence judiciously, though somewhat artificially, regulated. . . . But his manner was rather imposing than persuasive; his habitual effort seemed to be to subdue without conciliating, and the impression left was more like that of submission to a stern than a humane conqueror. It must, however, be confessed, that Mr. Wilson on the bench was not equal to Mr. Wilson at the bar, nor did his law lectures entirely meet the expectations that had been formed.'

Quite recently his name has been made familiar to the lay public by the publication of the Memoirs of Colonel Hugh Wynne, who knew him both as tutor and as counsel, and who seems to have been an apt pupil and intelligent client, as he

learned to write very good English, and to treat of legal matters in a way satisfactory even to lawyers.

It does not appear that any successor to Judge Wilson was appointed by the Trustees at the time of his retirement, and in the conditions of professional and social life of that day and of long afterward, the system by which the student entered the office of a practising lawyer, and pursued his studies under his supervision and assisted in the clerical work of the office, was in many cases most efficient and satisfactory. Judge Wilson himself had read law with John Dickinson, who had been a fellow student of Thurlow and Kenyon in the Middle Temple, and in turn, at the request of Washington, he received the President's nephew Bushrod, afterwards Associate Justice of the Supreme Court, as his student. Indeed, all the great lawyers of the city, who came to the bar after the Revolution, qualified themselves by study and preparation in the office of a preceptor. It was by this method, that the larger part of the Philadelphia lawyers, whose names are engraved upon the walls of this building, became the leaders of the bar.

A sufficient explanation of the non-continuance of the Law School from the retirement of Judge Wilson, was that it was not yet needed, nor would it have attained a considerable number of students when reopened in 1850, had it not been for the fact that George Sharswood, then the President Judge of the District Court of the City and County of Philadelphia, and afterwards Chief Justice of the Supreme Court of Pennsylvania, was the first professor of the reorganized school. His relations to the members of the bar of this city were altogether peculiar to himself, and it may be doubted if any judge ever sat upon the bench, who was at once so revered and so beloved. It was largely to his personal influence, therefore, that the success of the school then and subsequently was due; but changes of hours and of locality began to interfere with office teaching, and those changes have been followed by others still more effective, until to-day, the removal of the Law School of the University to this side of the Schuylkill, may be accepted as the final proof of an accomplished change in this city in the method of preparation for the practice of the law. ✓

To recapitulate the successive and accumulating changes in social and professional life, which has brought this about, is quite unnecessary; but the fact is, that whereas the Law School has hitherto been, in this city, a supplement to office study, it will hereafter become, in most cases, a substitute. There has been conflict of opinion as to methods of teaching, and as to how far the Law School can, in itself, enable the student to make himself a lawyer, but no one has ever contended that the law was not a science, of which the principles could best be mastered by systematic study, under the direction of competent teachers. It is studied, however, by the intending practitioner, not merely nor chiefly for his own information, but as what the Germans call a 'bread-study,' for the purpose of making practical use of his learning in dealing with the complicated facts of life, in advising clients in the office, or in trying and arguing cases in court. Both aspects of the question, therefore, should be kept in mind.

It has always been, as it now is, a peculiar advantage of this school that from the time of Judge Sharswood and his colleagues, down to the present day, its Faculty has included men whose position on the Bench or at the Bar compelled them, day by day, to use and test their knowledge in the court room. It is the inestimable privilege of the classes now in this school, that they have the opportunity to listen to judges of the Federal courts, whose appointment was made to satisfy the demand of the practising lawyers of the District, and of lawyers who merit and possess the unqualified confidence of the profession and of the community. What they say commands respect everywhere else, and it will not fail to do so here. Dr. Arnold used to say, 'It is a good thing to admire,' and the greatest good fortune which can befall a young man is that he should follow his legal studies under such men as he will find here, to whom he can look up with generous enthusiasm as the ideals to whose measure it will be his hope to approach in his future life as one of a profession which they ennoble and adorn.

Whether the new order will accomplish the work of the old, and train up succeeding generations of as high a standard as those who have gone before, is the important question for all

of us. The rank attained by the leaders of the Old Bar, as Mr. Binney designated them, is everywhere recognized, but coming down to a time within the memory of many now present, it may be asserted with great confidence that the entire United States might have been challenged to produce their betters, when Mr. St. George Tucker Campbell, Mr. George M. Wharton, Mr. Theodore Cuyler and Mr. James E. Gowen were in the lead, with Mr. Meredith at their head. To turn out men of their stamp will be an achievement indeed, and no better fortune for the school can be asked for. For this work, Mr. Dean, you and your colleagues have now every help which the University can give you. Nothing will be lacking to the comfort, the convenience and the wants of the student. The Biddle Library, which perpetuates the memory of a leader of the bar, and of three sons, each in his own line pre-eminent, is as yet inferior to that of Harvard, of which Professor Dicey says that 'it constitutes the most perfect collection of the legal records of the English people to be found in any part of the English-speaking world;' but it is already large, and the sum annually applicable to its increase will soon make it adequate for the needs of the most erudite. Having thus free and immediate access to every authority he needs to consult, the diligent student will assuredly learn the use of books, and master a fair share of their contents.

Of all the influences to surround the student in this new home of the Law School, none should be more potent to kindle his ardor than the memories of the good and great men by which he will be surrounded. This hall, in which we are assembled, bears the name of a lawyer, who completed his studies in the Middle Temple, and who returned to take a most prominent and useful part in the American Revolution. He was a signer of the Declaration of Independence; Vice-President and President of the Continental Congress; Governor of Delaware; the author of the Constitution of that State; a member of the convention which framed the Constitution of Pennsylvania of 1790; Chief Justice of the Supreme Court of the state for twenty-one years, and its Governor for three terms.

In the first volume of Dallas' Reports, there is this letter from Lord Mansfield :

'To the HONOURABLE THOMAS M'KEAN, Chief Justice of Pennsylvania :

'KENWOOD, February 14, 1791.

'SIR:—I am not able to write with my own hand, and therefore must beg leave to use another, to acknowledge the honour you have done me, by your most obliging and elegant letter, and the sending me Dallas' Reports.

'I am not able to read myself, but I have heard them read with much pleasure. They do credit to the court, the bar and the reporter: they shew readiness in practice, liberality in principle, strong reason, and legal learning; the method, too, is clear, and the language plain.

'I undergo the weight of age, and other bodily infirmities, but blessed be God! my mind is cheerful, and still open to that sensibility which praise from the praiseworthy never fails to give—*Laus laudari a te*. Accept the thanks of

'Sir, your most obliged

'and obedient humble servant,

'MANSFIELD.'

From this judgment there is no appeal, nor can anything with propriety be added.

When elected governor, he conferred upon the people of this state the inestimable benefaction of the appointment of that great lawyer, William Tilghman, as Chief Justice, and the erection of this structure could not have been undertaken but for the noble liberality of a descendant who bore his name.

Of Wilson and Sharswood, whose names appear upon the main door, I have already spoken. It remains to add that the memory of Eli K. Price, George M. Wharton and Richard C. McMurtrie will be perpetuated by lecture rooms which bear their names, at the request of those whose filial piety or friendship led them to contribute to the erection of this building, in grateful appreciation of the professional labors, which gave them prominence at the Philadelphia Bar. The student will find some evidence of their learning and discrimination in the reports of the many arguments which they made in the

Supreme Court, and it is enough to say, upon this occasion, as can be truthfully said of all of them, that by none were they so highly esteemed as by their fellow members of the bar who knew them as men and lawyers, as well as men can know one another, and better than those engaged in any other pursuit can possibly do.

Mr. Carson will speak of Mr. Price at length to-morrow, and it need now only be said that his invaluable contributions to the statute law of the state, his active interest in the University, in the American Philosophical Society, and other associations devoted to literature, science and charity, secured him distinction as a citizen almost equal to that which his long, useful and honorable career won for him at the bar.

It is impossible, however, that any lawyer, who ever met Mr. Wharton in consultation, or listened to his arguments, could mention his name without at least alluding to his clearness of statement. By common consent, he had the most perfect power of statement of any man of his day, and no one could present any proposition, which he could not re-present in a form more simple and lucid.

This was, of course, the result of the exquisite certainty of his mental vision. It was as if his mind had been a perfectly finished lens, which never produced the slightest distortion or aberration, and presented every object with absolute sharpness of definition. Something he once said as to his habits of reading is worth recording, as illustrating clearly what may be done by system. It will be remembered that he was, in his day, the leading authority in this Diocese upon Church Law. When returning a copy of Derby's Homer, he said that he had listened to the reading of the entire twenty-four books, and he added that it was his rule to read or listen to another read some standard work for a half hour every evening, and that one who tried it would be astonished at how much could be gone through in that way, and as a further instance, he added that by giving the time every Sunday between morning and afternoon church, to Church Law, he had, in a few years, gone through all the authorities upon the subject.

Of Mr. McMurtrie, of whom some of us are in the habit of

speaking as the last scientific lawyer at our bar, there should be quoted two or three sentences from the eulogy delivered at his bar meeting by Judge Craig Biddle, as they bring out clearly his distinguishing characteristic as a lawyer :

‘ Mr. McMurtrie, if ever a man did, certainly loved his profession, and loved it with a sort of romantic attachment. Any man who violated the great principles of the law was, to him, a man who could not be tolerated for an instant. No matter from what source the law came, whether from the highest courts in the land or the humblest individual, if it was bad law, Mr. McMurtrie looked upon it as a forgery, as a counterfeit, as equivalent to an attempt to pass money which was not entitled to be current. His sturdiness in this particular gave a rather mistaken notion of his character, but the only thing that ever stirred him to wrath was the one I have just mentioned.’

‘ The emulation of examples like theirs makes nations great and keeps them so,’ and it will be for the men who are to come out from this school not only to maintain the traditions of the Philadelphia Bar as gentlemen and lawyers, and to do their part in helping to advance the progress of jurisprudence, and to extend the domain of justice and reason, but also to solve the problem always recurring and never definitely answered, whether the political institutions, which were framed by McKean and Wilson and their colleagues, are to be perpetuated as the enduring heritage of a free and virtuous people.

Of all institutions, the University is the most enduring. The life of this one has been brief compared to that of the historic schools, which have honored us by permitting their representatives to be here to-day; but it was given the power by John and Richard Penn to confer degrees, and since then, four Constitutional Conventions have been assembled to change the organic law of the commonwealth. For centuries to come, each year will see a body of men come forth from these halls to develop into the leaders of thought and action of their time. All that this community has done or can do to insure that they will use their power wisely is worth the doing, for it is not only true, as De Tocqueville said, that the

conservative force of the American Bar has been the greatest safeguard of American institutions in the past, but there is equal truth in the aphorism of Lord Bacon,—a man, as Coleridge says in quoting the remark, 'assuredly sufficiently acquainted with the extent of secret and personal influence,' that, 'the knowledge of the speculative principles of men in general between the ages of twenty and thirty is the one great source of political prophecy.'

In accepting the building on behalf of the Faculty of the Department of Law, William Draper Lewis, the Dean of the Faculty, said :

" Mr. Provost: A little over three years ago the Faculty of Law expressed to you, and through you to the Trustees, their earnest desire that there should be erected near the other University Buildings a permanent home for the Department. To-day you call upon us to occupy, exclusively for the purposes of the Law School, the most complete educational building in the country. To say that we deeply appreciate this more than generous response to our request is to express but feebly the feeling which stirs us at this moment.

When the University determined to erect a building for our Department, the Provost asked us to submit to him a detailed statement of the requirements of such a building. This request was complied with, and though these "requirements" necessarily involved a much larger building than any one had up to that time contemplated, we were not asked to modify our plans in the slightest detail. The architects, Messrs. Cope & Stewardson, were directed to prepare plans which should meet every want of the faculty. I need hardly tell you that they have done so. Indeed, if our successors find defects in the general interior arrangement of this building, in the distribution of the reading and lecture rooms, we of the faculty are alone responsible, for neither trouble nor money has been spared by the University in its efforts to give us all that we asked.

On this occasion, as we are about to occupy this building,

which has been dedicated by you, Mr. Dickson, to the cause of legal education and to the memory of those who in their time knew and loved the law, it is perhaps proper that I, as representing the faculty, should tell the friends of the University and the representatives of legal learning gathered here something of our educational ideal. If I were asked to state the thought which is uppermost in the minds of the faculty, shaping not only our acts as a body, but our individual work as teachers, I should reply: The thought that our chief aim is to enable our students to become efficient lawyers. I can therefore best give you a mental picture of our educational ideal if I show you what we mean by an efficient lawyer.

Some there are who tell us that we should try to make our teaching practical, others that we should confine ourselves to fundamental principles. The one regards the law as an art, and likes the word practical; the other regards the law as a science, and is fond of such expressions as 'grounded in the theory of the law.' It may surprise some of you to hear me say that our faculty has never discussed the question whether we should regard the law from the point of view of an art or of a science. We have never discussed this question because we are united in the thought that a system of legal education which pretended to give the principles of law, disassociated from their practical application, would be as useless as a system which confined the student to copying legal papers. All of us admit that law is a science. But it is a living science; one that is applied every day to the affairs of living men; and a science whose principles have been hammered out, not in the closet of the recluse, but in the effort to decide real controversies between man and man. Its rules have sprung from multitudinous instances. They are one of the results of the facts which make up our history. As the law has grown, so is it being developed. Even as I speak, hundreds of courts in this country and in England and her colonies, are consciously or unconsciously modifying the principles of our law by the effort to apply them to new controversies. If our economic and social development should cease, and we should become a static people, and the new cases in our courts were

always identical with some other reported case, law would cease to be a science. It would become merely an art, and would be no more interesting than the science of civil engineering, provided every bridge that was built was the duplication of some existing bridge. Again, if man should stop disputing with his fellow-man, the study of the law would be the study of purely historical phenomena. But in our complex, developing modern life new legal problems are arising every day. The law is not merely the study of phenomena connected with a bygone people. The law is a living science and a present art, and therefore there is no such thing as a practical as distinguished from a theoretical lawyer. There are only two kinds of lawyers, the efficient and the inefficient. If you can find a man whose only accomplishment is that he can draw a deed, provided you do not wish to accomplish something he has not seen done before, you may find a man who is useful occasionally to do your conveyancing, but you do not find an efficient lawyer who can talk to you by the hour on the advantages of codification, or on the comparative excellencies of the civil and the common law, or on the early courts in Rome; but cannot take the facts of a case between Jones and Smith, and give reasons which would appeal to a court why one or the other is right, then you may have found a man who is full of entertaining information, but again you have not found an efficient lawyer; you have not found the man which it is the desire of our faculty to graduate.

In our minds, the efficient lawyer is not merely the so-called practical man, and on the other hand not merely the so-called theoretical one. He is the man who can do well the work which the lawyer is called upon to do. He is one who can take the jumble of facts which his client calls a clear statement of the case, and see quickly and accurately the legal point or points on which the case will turn, and with this knowledge as a starting point, be able to get the facts before the court, and having done so, prepare his brief and argue intelligently the legal questions in his case. We believe that a system of legal education which trains him for part of this duty and not the other, is radically deficient. Our aim is to give the student a knowledge which will not only enable him

to argue a legal point, but which will enable him to bring a suit and prepare and try a case; not primarily because we believe that a knowledge of what is called practice is a necessary addition to a knowledge of the fundamental principles of law in order that a man may become a practicing member of the bar, but because we also believe that as the law is a science grown up from actual cases, and applied and still growing by application to actual cases, a knowledge of ancient pleading and modern practice is essential in order that the student may understand the fundamental principles of the law.

It may be asked, do all your students expect to practice law? Have you no place for one who wants to write on law or teach some branch of the law or legal history? Certainly we have a place for such a man. But we believe that his training should not, in the main, be different from the training of the man who intends to argue cases in court. The work of the lawyer in the preparation of his case, of the judge called upon to decide it, or of the writer or teacher who must compare it with earlier cases, criticise and explain it, is essentially the same. Each must examine the same books and face the solution of the same problems. To succeed in their respective spheres, the writer and teacher, no less than the judge or practitioner, must realize that he is dealing with an applied science. To grasp the exact meaning of a legal decision, he must thoroughly understand the mechanical forms, that is, the pleadings under which the case was presented to the court. He also must be familiar with the practical difficulties of proving certain classes of facts. In other words, we do not believe that one can intelligently teach or write on the law which his scholars or readers must apply in a real world, without a knowledge of the conditions under which the principles he discusses must be applied. And therefore, in saying that our chief desire is to graduate "efficient lawyers," we do not slight the man who comes to us to prepare himself for research work or teaching; but in trying to make him also an efficient lawyer, we take the only course which can make him an efficient student of the law.

While a knowledge of the theory and practice of the law forms the extent of the systematic teaching in our present

undergraduate course, I should leave you with a false impression if I were to allow you to go away with the idea that we think there are no other elements in the make-up of an efficient lawyer besides the training of his brain and hand. In law, as in all other departments of human endeavor, the efficient man must possess elements of character as well as intellectual and mechanical endowments. He must have in his character certain moral elements, and at least two other elements which I think we may also include under the designation of moral.

One of these elements of character we may call method or perseverance, according to the form of its manifestation. Whether we call it method or perseverance we cannot overestimate its importance. If a lawyer is not neat he hampers his own progress; if he cannot systematize his work, great success, except in rare instances, is denied to him; unless he is capable of long continued and persistent effort, he may never hope to obtain even a moderately respectable position at the bar. We cannot teach here directly and in a separate course, neatness, order, perseverance, but by holding this element of character before ourselves as essential to the real efficiency of our graduates, we can, and I believe do, accomplish something in this direction. Not alone with this object, but by no means wholly in disregard of it, we make our course and our examinations such that all our students understand that to obtain a good position in the class, or even to get through our course at all, there must be persistent work every day during the term, and that in each week the work must be systematized; to each day being given its allotted portion. Three years of such training, while it does not make all of our graduates paragons of neatness, method or persistence, undoubtedly has a distinct tendency to mold into the character this element, which, equally with knowledge and skill, is essential to efficiency.

There is a second element of character, very different from that to which I have just called your attention, but none the less essential. This is the element of mental independence in legal thinking. Mental timidity must not be confounded with the caution which very properly keeps a client out of a contest the issue of which is doubtful.

But the lawyer who for his legal opinions leans on his digest, his text-book, or his friend, wins only the cases which no one could help winning. Now independence of thought can no more be taught as a separate course than neatness or perseverance. Some have it naturally, others acquire it only by much persistence on the part of the teacher; others, again, no matter what is done for them, never acquire it. But we believe that it is true in law, as in other things, that much can be accomplished by the teacher if he is distinctly conscious of the importance of developing in his students the power to think for themselves. Therefore, in our teaching here, we encourage the student to work out the problems of the law for himself. Where there is a real opportunity for a difference of opinion, we are frankly indifferent as to whether he agrees with us or not, provided he can maintain his own opinion with legal reasons. The old idea that a teacher is a modern Gama-lial, at whose feet the student is to sit and drink in information without question, if it ever existed in this Department, has gone, and I trust gone forever. Each of us teaches by that method which appeals to him as best; some lecture, some use in part a text-book, some the so-called case-method; but the mental attitude of each of us towards our classes is, I believe, the same. It is that of the man who invites on the part of his students discussion, public or private, of the subjects in his course; it is that of the man who is making the distinct effort to give his students the power to think for themselves.

There is one other element in our concept of efficiency, harder to define, perhaps, but more important than all the others. From one point of view, it is the moral makeup of the man, from another it is his mental attitude towards the law. All departments of the University are striving to turn out men who will lead clean and honest lives. I believe the whole tendency of our life at Pennsylvania, as in other universities, is in this direction. Our dormitory system, our athletics, our Houston Club and our various student organizations, fill that portion of the daily life of our students not given to study with wholesome mental and physical occupation, and are important factors in the upbuilding of their character. Our work as a Faculty of Law, as we conceive it, is to

take the foundation of good morals which is, in an ever increasing degree, laid for us in the character of the great majority of our students by home and university influences, and build thereon something which will make our graduates, not only moral men, but moral lawyers. A man rightly is considered moral when he has certain general positive and negative qualities ; if he is temperate in his life, honest in his business dealings, kind to those dependent on him, and considerate of his fellow men. It is our thought that a lawyer should be all this and more. Perhaps this "more" can be summed up in a single sentence : He should love the law and guard her. If he does this, slovenly and inaccurate work, careless legal advice will be impossible to him ; the etiquette of the profession he will guard with jealous care ; he will keep his own actions on a high plane, and place under the ban of wholesome disdain those who sully the high traditions of the Bar.

How can a law school teach affection and reverence towards the law and the profession thereof? By formal courses in legal ethics? We do not think so. Can nothing therefore be done in this direction by a law faculty? That is the opposite error. There is a subtle thing which all teachers know as the atmosphere of a school. There always is an atmosphere. It may be very good, or very bad, or neither one nor the other. This mental atmosphere, in part, is left by those who have graduated ; in part it is the effect of the mental attitude towards his coming work, brought by the incoming student, and in a great part it is the character of the teachers, the efficiency of the school taken as a whole, and the dignity and decorum of its surroundings. I need hardly tell you that, following the example of our predecessors, we of the present faculty have labored and are laboring, with the efficient assistance of large numbers of our students, to make this mental and moral atmosphere of which I have been speaking such that our graduates may not only be skilled in the theory and practice of the law, may not only have in a greater measure than they had on entering, method in work, perseverance in endeavor, and independence in thought, but also that they may have a deep love and enthusiasm for the law, which will

abide with them throughout their lives, shielding them from all temptation to do anything which would tend to bring her or them as lawyers into disrepute.

Over the main staircase of this building, so as to be seen by one about to leave it, is to be carved the words of the great Judge whose unselfish labors created this Department of the University. They are the words of George Sharswood: 'Truth, simplicity and candor, these are the cardinal virtues of a lawyer.' Let us hope that each new man, as he takes up the work of teaching here, will consider well the labors for the cause of legal education of such men as he who framed this sentence, of such men as Morris, as Mitchell, and as Hare. These men not only taught their students the law, but impressed them with some of the dignity of their own character and their own devotion to the profession. We, and those who will take up our work when we lay it down, by following the example of their devotion, may perhaps also be able to write in the hearts of our students those three all-embracing words—'truth,—simplicity,—candor.'"

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

ATTORNEY AND CLIENT.

Gen. Stat. (Colorado), § 3630 provides that, in addition to his commission, an executor shall receive "such additional allowances for costs and charges in collecting and defending the claims of the estate and disposing of the same as shall be reasonable." Under this statute it was held by the Supreme Court of Colorado that, while an executor is entitled to a reasonable counsel fee, yet where he, being a lawyer, acts as his own counsel, he is not entitled to an extra allowance on this account, since, "to allow him to become his own client, and charge for professional services for his own case, although in a representative or trust capacity, would be holding out inducements for professional men to seek such representative places to increase their professional business, which would lead to the most pernicious results": *Doss v. Stevens*, 59 Pac. 67.

In *Burpee v. Townsend*, 61 N. Y. Suppl. 467, the Supreme Court of New York decided that the parties to an action have the right to settle and discontinue, even though the effect of such discontinuance is to deprive one of the attorneys of his lien. This question has been decided variously. As Gaynor, J., said, the authorities are "a bundle of confusion."

BONDS.

Following the rules now firmly established in the federal jurisdiction, the Circuit Court of Appeals, Eighth Circuit (Caldwell, J., dissenting), held that where suit is brought upon county bonds, issued to refund judgments obtained against the county, (1) the judgments are *res judicata*, not only of every matter actually decided, but of every matter which might have been decided in the former actions, and (2) that the recitals in the bonds of the existence of the judgments estop the county from alleging, as against *bona fide* holders for value that the judgments do not exist: *Geer v. Board of Com'rs of Ouray*, 97 Fed. 435.

BONDS—(Continued).

But the rules above stated apply only to bonds and not to warrants upon the treasurers of municipal corporations for the payment of money. Such warrants, while transferable by indorsement and delivery, are not negotiable instruments under the law merchants, and recitals contained in them do not estop the municipality from alleging the falsity of the recitals and the invalidity of the warrants, even when they are in the hands of indorsees for value: *Watson v. City of Huron*, 97 Fed. (Circ. Ct. of App., 8th Circ.) 449.

CARRIERS.

In *The Humboldt*, 97 Fed. (D. C., D. Wash.) 656, the plaintiff, a passenger for some days on board a steamship owned by the defendant, deposited his valise in his stateroom, from which it was stolen. Although unable to prove negligence on the part of the defendant, the plaintiff contended that the latter occupied toward him the position of an inn-keeper toward his guest. Hanford, J., following the weight of modern authority, decided that the steamship company was not an inn-keeper, but only a common carrier, and therefore was not liable, since the baggage had not been entrusted to its custody and care.

Following the doctrine announced by the Supreme Court of the United States, that a contract between a state and a corporation, exempting the latter from taxation, must be limited in its effect to the immediate parties thereto, the Circuit Court (E. D., N. C.) has decided that where a state has granted to a railroad the privilege of established rates; such privilege, even if a contract between the state and the railroad, does not pass under a foreclosure sale of all the "franchises, rights, privileges and immunities" of the railroad to its successor: *Matthews v. Corp. Board of Com'rs*, 97 Fed. 400.

CONFLICT OF LAWS.

In *Blethen v. Bonner*, 53 S. W. 1016, the plaintiff claimed that the Texas courts should presume that the common law existed in Massachusetts in 1863, by virtue of Chap. 6, Art. 6, of the constitution of Massachusetts of 1780, which provided that, "All the laws which have heretofore been adopted, used or approved in the province, colony or state of Massachusetts Bay, and usually practiced in the courts of law, shall still remain and be in full force until altered or repealed by the

**Municipal
Warrants,
Impeachment**

**Liability of
Steamship
Company for
Baggage**

**Railroad,
Right to
Regulate
Charges.**

**Presumption
of Common
Law in
Sister State**

CONFLICT OF LAWS (Continued).

legislature." The Supreme Court of Texas, however, decided that the above provision was not sufficient to rebut the presumption that the law of Massachusetts was similar to that of Texas, in the absence of evidence to prove that the common law of Massachusetts had not been altered by statute subsequent to 1780.

CONSTITUTIONAL LAW.

The constitution of New York (Art. 9 § 1) provides that, "The legislature shall provide for the maintenance and support of a system of free common schools wherein all the children of this state may be educated." In *People v. School Board*, 61 N. Y. Suppl. 330, the Supreme Court of New York decided that this section was not infringed upon by a law providing for separate schools for white and colored children (equal facilities being given to each class of schools), nor did the law invade any rights guaranteed by the amendments to the Constitution of the United States.

Since the late decisions of the Supreme Court of the United States, the scope of *Gelpcke v. Dubuque*, 1 Wall. 175, has become well settled. The latest addition to the subject is *Allen v. Allen*, 97 Fed. 525, where the Circuit Court of Appeals (Ninth Circuit) affirmed the rule that the decision of the highest court of a state, introducing a new construction of a state constitution, which acts injuriously on previous contracts made on the faith of the former construction, is not a "law" within the clause of the Constitution of the United States forbidding any state to pass a law impairing the obligation of contracts.

CONTRACTS.

In *Fresno Milling Co. v. Fresno Canal Co.*, 59 Pac. 141, the defendant agreed to deliver water to the plaintiff through a certain canal, it being provided that the defendant should not be liable in case it was "lawfully or forcibly restrained from such delivery." The defendant allowed the canal to become a public nuisance, whereupon the canal commissioners filled it up and secured an injunction restraining defendant from attempting to operate it. In an action for failure to supply the water, the Supreme Court of California held that the facts presented an *impossibilitas rei*, as opposed to an *impossibilitas facti*, and that defendant was excused from performance.

CONTRACTS (Continued).

In *Carper v. Sweet*, 59 Pac. 45, it appeared that plaintiff, the broker of defendant, negotiated with a customer for the sale of defendant's property, but the sale was not consummated. Subsequently another broker, employed by the defendant, sold the same property to the same customer. The plaintiff contended that he was entitled to his commission since the property was sold to the purchaser with whom he had negotiated, but the Supreme Court of Colorado decided that the case fell within the rule that where a principal has openly placed his property in the hands of different agents for the sale, he may pay the commissions to the one who produces the purchaser, and be relieved from liability to the others.

A statute of Colorado (1883, § 3121) provides that any instrument of writing to which the maker shall affix a scroll by way of seal shall be of the same effect as if the same were sealed. It was held that the printed word "seal," under the recital "sealed with our seals," was sufficient to satisfy the requisites of the statute, without the necessity of the maker actually placing any seal or scroll thereon: *Carlile v. People*, 59 Pac. (Colo.) 48.

In an action to recover for negligence the defendant set up a written release by the plaintiff. The latter contended that it was expressly stipulated as part of the consideration for the release that the defendant should give the plaintiff employment when he recovered from the effect of the accident, and that the defendant had failed to do so. *Held*, that in the absence of fraud by the defendant at the time of the execution of the release, the mere fact that defendant did not keep his promise subsequently, afforded no reason for setting the release aside: *Szymanski v. Chapman*, 61 N. Y. Suppl. (Sup. Ct.) 310.

EVIDENCE.

On an indictment for larceny the prosecuting witness testified that at the time of the occurrence he felt the defendant's hand in his pocket and called out to the bystanders, "They are robbing me." *Held*, that the exclamation of the witness was admissible as part of the *res gestae*: *People v. Piggott*, 59 Pac. (Cal.) 31.

Stewart v. St. Paul Rwy. Co., 80 N. W. 855, suggests a reasonable limitation to the rule admitting photographs in evidence. In that case, which was an action for negligence, the question at issue was the distance of a hole in a street from a point at which a street

**Photographs
as Evidence;
of Distance**

**Release,
Failure of
Consideration**

**Requisites
of Seal**

**Rival
Brokers,
Commissions**

EVIDENCE (Continued).

car stopped. The defendant proved that, some months after the accident, the same car was moved to the exact place where it had stood, a crowbar was inserted where the hole had formerly been (afterwards filled up), and a photograph of the scene was taken. The Supreme Court of Minnesota held that the offer of a photograph in evidence was properly rejected, on the ground that the question of distance was a mere mathematical problem, to be solved by measurement, and that the photograph would probably only confuse the minds of the jury on that point, since photographs are very misleading as to distances, relative size or location of objects.

HUSBAND AND WIFE.

Following the construction given by the Pennsylvania courts to the Married Women's Property Act of 1848, the Supreme Court of Missouri has held that the Missouri Act of 1889 (Rev. Stat. 6864), providing that married women should be as *femes sole* in respect to their property, was not sufficient to abrogate the common law rule in regard to a husband's liability for the torts of his wife: *Taylor v. Pullen*, 53 S. W. 1086.

Scherer v. Scherer, 55 N. E. 494, illustrates the close scrutiny which courts apply to all contracts of separation between husband and wife. In that case the wife brought suit against her husband on the latter's contract to support her, the contract reciting that the parties were living apart, "by reason of the abandonment one of the other." The Appellate Court of Indiana decided (1) that if the abandonment of the husband had taken place for a cause not justified by law, the contract of support would be without consideration and void, and (2) that in the absence of proof by the wife that she had left her husband for legal cause, there could be no recovery.

INSURANCE.

Where a fire insurance policy provides that proof of loss shall be furnished to the company "forthwith," the time is not limited to the same extent as it would be under a "Forthwith" similar provision in regard to notice of loss. Thus in *Rines v. German Ins. Co.*, 80 N. W. 839, the Supreme Court of Minnesota held that a proof of loss sent eighteen days after the fire and received by the company twenty-one days after the fire satisfied the above clause, while intimating that the same might not be true of a notice of loss.

LIMITATION OF ACTIONS.

The charter of a railroad, granted in 1865, provided that where the line should be constructed through the land of any person, it should be the duty of the railroad to construct suitable crossings, whereby access to the different portions of the land might be made easy, upon failure to do which, the railroad should be liable in damages. In *Louisville & N. R. Co. v. Pittman*, 53 S. W. 1040, the railroad claimed that as its line had been constructed through plaintiff's land for thirty years prior to the action, its liability was barred by the statute of limitations. The Court of Appeals of Kentucky decided that the duty of the railroad was a continuous one, therefore the right of action was not barred.

MASTER AND SERVANT.

It is impossible to formulate any absolute rule defining exactly the limits of the duty of a master to furnish safe appliances for his servants, but each case must be decided on its peculiar facts. In *Blakely Mill Co. v. Garrett*, 97 Fed. 537, the plaintiff, a workman, on a freight train, was injured through the breaking of the wooden supports which, fitted in iron sockets, held the load in place on a flat gondola car. A fellow servant had selected the supports from wood supplied by the defendant, and it was contended that the accident resulted from his negligence in not using sufficient care in the selection, but the Circuit Court of Appeals (Ninth Circuit) decided that the defendant was under the absolute duty of furnishing wood of an adequate quality, and it could not delegate the duty of making the selection to a servant.

NEGLIGENCE.

Where premises are leased in an unsafe condition and the lessee could, by the exercise of ordinary diligence, discover this condition, and where the lessor has not endeavored to conceal the defect from the lessee, the lessee, and not the lessor is liable to a third person for injuries received by reason of such defect: *Schwalbach v. Shinkle*, 97 Fed. (C. C. A., Ninth Circuit) 483. But it was said in this case that if the lessor were liable at all, he and the lessee would be liable jointly; therefore, it was held that the complaint in an action against the lessor and lessee was not demurrable on the ground that it joined separate causes of action.

QUASI-CONTRACTS.

Perhaps no legal text-book of a theoretical character has been so universally recognized as expounding, in fact, almost creating, a new branch of the law, as that of Professor Keener on Quasi-Contracts. The latest case in which the principles laid down in that excellent work were applied is *Cleveland, etc., Rwy. Co. v. Shrum*, 55 N. E. 515. There it appeared that an attorney, of his own motion, sued on behalf of a railroad to recover back taxes which had been illegally collected from the railroad. The latter received the taxes from the attorney, but refused to pay him a fee, whereupon he brought an action against the road, upon an implied assumpsit, to recover the value of his services. After quoting several pages of Professor Keener's work, the Appellate Court of Indiana held that as the attorney had not been employed by the railroad, and there did not appear to be any reason why the railroad would have been compelled to employ him rather than any other attorney, the services had been rendered officiously, and the mere fact that the railroad had been benefited did not create any liability on its part. "From the authorities cited [by Professor Keener], we think it may fairly be deduced that one rendering services for another, in which the interests of the public are not involved, may, when the benefit of such service is enjoyed, recover the reasonable value of such service from the person who receives the benefit, although services are rendered without the knowledge of the beneficiary. But from the authorities it is also clear that there must exist a necessity for the rendition of the services without entering into a contract, or there must exist such circumstances as imply an obligation to pay therefor. This view is in line with the proposition that one may not force his services upon another, and that one has a right to select his creditor."

WILLS.

Webster v. Lowe, 53 S. W. 1030, carries the rule of construction of ambiguous papers as wills to a ridiculous extent. In that case the paper offered for probate was a mere autobiography of a man's life. The only provision from which a testamentary intention could possibly be deduced was the last sentence, reading: "I have requested my executors to give a clear deed for the property, after my death, to A." The Court of Appeals of Kentucky held that this sentence operated as a will, although to some minds it would clearly indicate that its writer did not intend it as a conveyance, but was referring to some other instrument.

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BILLS AND NOTES; IMPLIED AUTHORITY TO FILL UP BLANKS.
—*Moore v. Henshaw*, 55 N. E. 236 (1899). This was a suit on a note of which one Elwood Moore was the maker. The appellant (defendant) was Moore's surety on the note; the appellee (plaintiff) was the payee. The note in question was given to satisfy three other notes, which Moore was unable to meet. All the parties to the instrument, including the appellant, agreed that the note should bear 8 per cent interest; but after the note was executed it was discovered that the rate of interest had not been specified. Then Moore, the maker, inserted the figure "8," being requested to do so by the ap-

pellee. This insertion was made without consulting the appellant (surety), but it was apparently in pursuance of the previous agreement, to which he was a party. The lower court did not believe that, under these circumstances, the surety had a good defence; but he appealed, and in the present case the lower court was reversed and judgment given for the appellant. The ground of the decision was that there had been material alteration of the note, which released the appellant from liability.

The case does not seem reconcilable with the authorities. The court cites a number of cases in support of its decision, but upon examination it is found they do not support. They are all in affirmation of a proposition which, while it is undeniably good law, is not applicable to the point in question; because prior to the application, it presumes a state of facts which is not present here. That is, that the alteration be made without authority. After saying that a material alteration will avoid a note, the court says: "It is a material alteration to add an interest clause . . ." and proceeds to cite cases.

Hart v. Oehler, 80 Ind. 83 (1881), held that crossing out the words, "Interest on this note has been paid to maturity," discharged the defendant upon his previously made contract of indorsement. There was no express or implied consent to the alteration.

In *Shanks v. Albert*, 47 Ind. 461 (1874), *Schwind v. Hackett*, 54 Ind. 248 (1876), and *Brown v. Mitchell*, 79 Ind. 84 (1881), the facts were the same, even as to the rate of interest inserted. In each case the holder inserted the words "at 10 per cent int.," which would seem to be a popular proceeding in Indiana. The judges held very unanimously and very properly that this innocent pleasantry upon the part of the holder released the maker from all liability upon his instrument.

With a pleasant sense of variety we note that in the case of *Boustead v. Cuyler*, 116 Pa. 551 (1887), the rate inserted was 6 per cent ("with interest at six per cent until paid"), while in *Hart v. Clouser*, 30 Ind. 210 (1868), the holder decided upon the rate of 8 per cent. It was decided in both cases that the notes were avoided, releasing, in the former case, the maker, in the latter, the surety.

In citing these cases the court apparently lost sight of a great distinguishing feature between them and the case under its consideration, *i. e.*, the previous agreement. In no one of the cases cited was there any authority to make the alteration, either express or implied. But what was done in the present case, Moore had authority to do, implied from the previous agreement to which the appellant was a party. By filling in the blank, Moore made instrument conform to the true intention of all the parties as evidenced by the agreement. His right to do this is supported by many cases.

Without more than mentioning the distinction to be taken between making an alteration—in the cases cited, inserting an entire interest clause—and merely filling in a blank—here inserting the figure "8" in an already existing clause,—although the distinction is by no means unimportant (*Vosher v. Webster*, 8 Cal. 109), we pass to the consideration of two other cases cited by the court, which

although open to the same objection as those already mentioned, as far as their bearing upon the present case is concerned, yet deserve more than mere mention because of the suggestion in each, of the principle upon which *Moore v. Henshaw* should have been decided.

In *Palmer v. Poor*, 121 Ind. 136 (1889), the insertion of the figure "8," "without the knowledge or consent of the maker," was held to be such a material alteration that no recovery could be had. It is quite plain from the opinion of the court that if there had been any such prior agreement as in *Moore v. Henshaw*, the decision would have been different. Says the court in speaking of the case of *Marshall v. Drescher*, 68 Ind. 359, and distinguishing it from the case then deciding, ". . . there the circumstances were such as to create the implication that the holder of the note had authority to fill the blank left in the instrument, and it was upon this ground that the note there under consideration was held valid." Thus clearly showing that if any such implied authority had been present in *Palmer v. Poor* the result would have been different.

The other case is *De Pauw v. Bank*, 126 Ind. 553, 25 N. E. 705 (1890). There the note was complete in all its terms. It was indorsed in blank by the defendant. The decision was that the maker had no authority, implied from the fact that the indorsement was in blank, to agree with the payee that the indorser should be liable as surety. How this case supports the decision in *Moore v. Henshaw*, it is somewhat difficult to see. Indeed, in one part of the opinion it is said, "It is undoubtedly the law, that where one . . . leaves blanks in a note necessary to be filled . . . he thereby clothes the holder with implied authority to fill those blanks."

There was stated the principle of law which should govern *Moore v. Henshaw*. In *Hervey v. Hervey*, 15 Maine 357 (1839), it was said that the holder of a bill has the right to alter it and correct mistakes if he thereby makes the instrument conform to what all parties to it agreed or intended it should have been. *McCraven v. Chisler*, 53 Miss. 542 (1876). "Where an alteration in a promissory note conforms to true intention of the parties and is honestly made . . . it will not vitiate the note. The law will presume assent." *Duker v. Franz*, 7 Bush 273 (1870). Holder of a note may make an alteration to correct a mistake if he make the instrument conform, etc. See also *Fisher v. Webster*, 8 Cal. 109 (1857), and *Cole v. Hills*, 44 N. H. 227 (1862). *Connor v. Routh*, 8 Miss. 176 (1843). The insertion of words and figures which have been left out is no defence. This note was payable "24 ——— after date." Holder was allowed to insert the word "months." *Ames v. Colburn*, 11 Gray 390 (1865). Alteration was made in date of a note which had been antedated. This was allowed as making the note conform to the true intention of the parties. *Boyd v. Brotherson*, 10 Wendell 93 (1832). A note was for "eight——dollars." The holder was allowed to insert "hundred," on proof that that was intent of parties. *Hansom v. Hansom*, 41 Ga. 303 (1869). Maker of a note upon which the defendant was surety, introduced a clause making it payable in gold. Whether this invalidated the note was said to depend upon whether such was the original understanding. "A mere

reduction to writing by the principle of what was in fact the agreement of the parties, would not be a change of contract." See also *Chute v. Small*, 17 Wendell 238; *Hunt v. Adams*, 6 Mass. 519; Am. and Eng. Enc. of Law, 1 Ed. Vol. 2, p. 339; 2 Ed. Vol. 4, p. 153 N. 1; *Lowmes v. Freer*, 4 Ill. App. 547. Parsons on Bills and Notes, p. 569: "Mistakes in a bill or note may be corrected, and the alteration will not vitiate . . . The insertion of either words or figures left out by mistake is no defence."

CORPORATIONS; NATURE OF LIABILITY FOR ASSESSMENT ON STOCK.—*De Weese v. Smith*, 97 Fed. R. 309—1899. (Circ. Ct. W. D. Mo.) This was an action at law by the receiver of an insolvent national bank to enforce an assessment imposed by the Comptroller of the Currency upon the stockholders. He had previously in an action at law enforced an assessment of 75 per cent. The Circuit Court, per Phillips, J., held that the recovery in the first action precluded any further proceedings. The subscribers for bank stock under Sec. 5151, Rev. St. U. S., enter into an agreement that they will be liable severally to an assessment to the amount of the face value of their stock in case of a deficit. But, to the mind of the court, this contract is indivisible, and when once recovered upon can no longer be made the basis of any action. They see nothing in the statute to defeat the common law rule that a contract once recovered upon cannot be again employed.

There are grave objections to such a view of the statute from the standpoint of public policy. Furthermore, we do not believe that the stockholder's liability is conformable to the strict rules of the common law. The comptroller in his report for 1898 (vol. i, p. xxxvi) speaks of the difficulties in discovering the exact deficit. When the assessment is made after all the assets have been disposed of there is little danger of mistake, but the assessment is generally made before the liquidation of the assets. In these cases mistakes are sure to arise. How can the receiver know whether all the debtors will be solvent? In the meantime, must the creditors wait before any assessment will be declared? Again, during such delay many of the stockholders are liable to become bankrupt. Should any creditor be subjected to such a disadvantage? It seems only just that the creditor should be entitled to a speedy assessment with the privilege of a further one if the funds prove insufficient.

The court, in support of its contention, quotes the declaration of the comptroller that it has been the practice of the comptroller to regard such levy as irrevocable and unchangeable, although further development may demonstrate error in the assessment. But it is quite evident that the comptroller does not regard himself as bound by any such precedent. He speaks of the inconvenience and injustice of the method, and feels that there is nothing in the decisions of the Supreme Court to hold him to it.

Probably the most authoritative exposition of the law is the decision of J. Swayne in *Kennedy v. Gibson*, 8 Wall. 505 (1869).

He says: "Where the whole amount is sought to be recovered the proceeding *must be* at law. Where less is required the proceeding *may be* in equity, and in such cases an interlocutory decree may be taken for contribution and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted." Despite what the court, in the case under review, said, we cannot see what there is in the opinion to prevent the comptroller from making a provisional assessment and enforcing its collection in an action at law. The Supreme Court did recommend the action in equity, but they evidently regarded the stockholder as liable up to par value of his stock, although the first contributions desired were for only part thereof.

The words of the same judge in a later case, *U. S. v. Knox*, 102 U. S., 422 (1880), are even more conclusive, viz: "Although assessments made by the comptroller under the circumstances of the first assessment in this case *and all other assessments, successive or otherwise*, not exceeding the par value of all the stock of the bank, are conclusive upon stockholders, yet if he were to attempt to enforce one made clearly and palpably contrary to the views expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction." Although the case did not hinge upon this point, we feel that in the absence of any express decision to the contrary, that the provisional assessment can be justified.

The difficulties of the case may be solved to a great extent by ascertaining the exact nature of the receiver's position. He is "the statutory assignee of the association and is the proper party to institute all suits." *Kennedy v. Gibson* (supra) page 506. Under the common law, the stockholder would have been liable directly to the creditor, but under statute law and judicial construction the stockholder's liability has been turned into an asset of the bank: *State v. Union Stock Yards Bank* (Ia.) 70 N. W., 752 (1897); *Wilson v. Book* (Wash.) 43 Pac. (1896); *Farmer's Loan Co. v. Funk*, 68 N. W. (Neb.) 520 (1896).

Now, of this trust fund, the comptroller and, under him, the receiver is the trustee, acting for the protection of the interests involved. Comptroller's Rep. (supra). It is true that the court in *Kennedy v. Gibson* (supra) held the comptroller's decision final as to stockholders, under proper circumstances; still there is nothing to lead us to agree with Judge Phillips in the present case that that decision exhausts the comptroller's power. There seems to be nothing in all the decisions to prevent the comptroller from either laying a further assessment where such is needed or repaying such sum to the stockholders as is not needed.

It is on this point of rebate to stockholders that we find an irreconcilable difference between the common law contract and the stockholder's liability. The fact that there ever is a rebate shows that the assessment is not enforced by the receiver by any absolute right. He has collected more than was needed; he had a right to only so much as was needed. The assessment, so far from being

final, is always—due to the uncertainties in realizing the assets—provisional, subject to a rebate or an increase as the case may demand.

The rule contended for by the comptroller will be more equitable to the stockholder than that laid down in the present case. If the comptroller as trustee can enforce but one assessment, is it not his duty to the creditors to make that levy sufficiently large? Where any great uncertainty prevails would he not be justified in making an assessment of 100 per cent where there may finally be a need for only 50 per cent? In the meantime, the stockholder would be deprived of the use of his money. It would be more convenient for the stockholder to meet his liabilities as they are ascertained. In a recent Minnesota case, the court has adopted the novel method of granting judgment for the full liability of the stockholder; but the creditor can enter up judgment only from time to time under the sanction of the court. When all the debts are met, the judgment is satisfied upon the records. *Harper v. Carroll*, 69 N. W. (Minn.) 611 (1896). But there are grave objections to allowing a judgment to hang over a man's head in this manner. The method advocated by the treasury authorities is more equitable, and, in the absence of any decisions forbidding it, should be adopted.

BOOK REVIEWS.

CURIOSITIES OF LAW AND LAWYERS. By CROAKE JAMES. New Edition. New York: Funk and Wagnalls Company, 1899.

In this work the author, as he states in his preface, has collected many favorite sayings, standard illustrations, golden sentences, exploits of legal heroes, jests, explanations of curious and memorable doctrines and incidents which make up the "natural history" of the legal fraternity. The book contains many pleasing anecdotes relating to the profession, and the author has truly selected and assorted his material with great care. In it will be found much to amuse, interest and edify lawyers as well as laymen. On the whole the author and the publishers should be congratulated in bringing out such a work of general interest. *J. E. S.*

REQUIREMENTS FOR ADMISSION TO THE NEW JERSEY BAR. JOHN A. HARTPENCE. Trenton: Brant Press, 1899.

If fulfilment of the purpose for which a thing is created be the test of merit, this little book is a meritorious one, for it leaves no question with which it deals unanswered. The student is frequently perplexed by the general nature of the rules of court governing admission to the bar; these rules Mr. Hartpence explains by a commentary which will make them understood by all, and to this he has added the rulings of the court as to such as have been passed upon. The book contains also a list of text-books recommended to students, forms of certificates required, etc., and a guide to the reading of Blackstone's Commentaries. The imprimatur of the Brandt Press sufficiently attests the excellence of the presswork. *W. E. M.*

CASES IN THE LAW OF THE SALE OF GOODS. By FRANCIS M. INGLER. Indianapolis and Kansas City. Bowen Merrill Co. 1899.

This work being of very abridged form gives us only a brief outline of the vast subject of sales, one of the largest and most important in our system of jurisprudence. The outline is the very best since it follows the admirable work of Reuben M. Benjamin on Sales. The author has carefully selected the cases and presented them in a concise form; not omitting any essential element, however. The number of them is quite small considering the vast amount of litigation consequent upon our gigantic commercial transactions. The book, therefore, is adapted only for those who propose acquiring an elementary knowledge of the subject. Taken in connection with a study of Mr. Benjamin's work it should prove a great labor and time economizer for those who do not propose going deeply into the all-important subject of Sales. *M. H.*

AMERICAN BANKRUPTCY REPORTS, ANNOTATED. By WILLIAM MILLER COLLIER. Albany: Matthew Bender. 1899.

Ever since the passage of the National Bankruptcy Act in June, 1898, our Federal courts have been busy construing its various provisions. It practically superseded all state laws on the subject and thus made bankruptcy of exclusive Federal jurisdiction. Just at this time, not only to Federal court practitioners, but to lawyers at all bars, this volume is of great importance. The various clauses of the act have hardly received a settled interpretation and these cases are therefore of value to both judge and attorney. Probably the most striking portion of the work is found in the opinions of the referees, many of which have been carefully written out, together with their syllabi, by the referees themselves. The annotations, cross-references and indices are full and complete. Those who make a specialty of insolvency and bankruptcy should certainly have these reports near at hand.

J. M. D.

THE CUSTODY OF INFANTS. By LEWIS HOCHHEIMER. Baltimore: Harold B. Scrimger. 1899.

The prevalence of divorce suits however displeasing it may be to the moralist is a source of gratification to the lawyer, for it has resulted in a development of this particular part of the law of domestic relations. And this, too, to an extent never dreamed of by the common law lawyers, with their petitions to parliament and their stern probate judges. When the contending parties are released from the bonds of matrimony, the first question that arises is, who is to have the custody of the children, if there be any? To settle this vexing question, the book before us is of exceeding value. The cases cited are numerous and to the point, and the thought is clear, though not at times well expressed. We notice that the author has not placed in sufficiently close juxtaposition the two great rules—first, that in disposing of the custody of infants the court will always consider the welfare of the child, and, secondly, that the wishes of the child, if it is of reasonable age, will frequently determine the court's decision. The appendix contains forms presumably from the Maryland rules of court. On the whole the work is well worthy of perusal, being both interesting and instructive.

J. M. D.

STUDIES IN STATE TAXATION. By GRADUATES AND STUDENTS OF THE JOHNS HOPKINS UNIVERSITY. Published in the Johns Hopkins Studies in Historical and Political Science. Series XVIII, Nos. 1, 2, 3, 4. Baltimore: The Johns Hopkins Press. 1900.

This recent publication from our sister university is marked by the same careful research, thorough assimilation and clear presentation so noticeable in past productions of "Johns Hopkins." The authors, without sacrifice of force, have accomplished the difficult task of making interesting a proverbially dry subject.

In pursuance of class studies in American commonwealth finance, the students undertook individual investigations. The satisfactory results thus obtained led to a more extended research under a uniform plan of work, and the present volume is the outgrowth of this undertaking. The work embraces five essays, each presenting a many-sided and well-rounded view of the historical, political, economic, and critical phase of the taxing system of some one state. The survey covers Maryland, North Carolina, Kansas, Mississippi and Georgia. Each paper includes a description of the broad industrial character of the state under investigation, a review of its general finances, a history of the development of taxation and public income within its borders, a careful, separate analysis of each of the leading taxes, and a few thoughtful suggestions and pointed criticisms for alteration or reform in the existing system.

To the student or administrator of taxation, as taxation exists in the narrow field covered by these essays, their value is obvious, collecting, as they do in one volume, a mass of statistical and historical information that would otherwise be attainable only after long research. The suggestions of criticism and reform are of like obvious value. Less apparent perhaps, but no less real, is the importance of this publication to the general student of taxation in the United States. A reading, however casual, of these five essays, amounts to such a comparative study of state taxation as will lead the reader irresistibly to a realization of the diversity of need bound to be felt, and the diversity of administration adapted to that need, as between communities differently situated geographically and climatically, with their consequent variations of political and economic history and development. In the preface, Dr. Hollander hints at this broad significance and unity of the volume in "emphasizing the impracticability of any universal application of commonly accepted principles of tax reform." Granting the truth of the conclusions investigators of state taxation have in past drawn, we must remember that the field of investigation has been almost exclusively confined to the North and East, and we must therefore not regard those conclusions as a rule of thumb for application to less advanced communities. As a warning against this pitfall, and as an invaluable aid to those who may hope to propound any general theory of taxation, we heartily commend this study of fiscal practice and experience in less advanced communities, "where corporate organization is limited and intangible wealth a minor element."

W. S.

Chas. M. ... 191-192

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THE LEGAL EFFECT OF THE ACQUISITION OF THE PHILIPPINE ISLANDS.

THE RIGHT AND THE POWER OF THE UNITED STATES TO ACQUIRE TERRITORY.

By the exchange of ratifications at Washington, on April 11, 1899, the Treaty of Paris, between the United States and Spain, went into complete effect. By the third article of this Convention, "Spain cedes to the United States the archipelago known as the Philippine Islands." It is foreign to the purpose of this article to discuss the policy of our government in accepting these islands, but it may be well here to consider the *right* and the *power* of the United States thus to acquire them.

Under the laws and usages of nations, the right of extending its bounds and acquiring new territory has always been regarded as inherent in every sovereign state. In the language of Bynkershoek, "*Postquam Lex certos dominii acquirendi modos præscripsit, hos sequemur*" (Opera III, 254), while Grotius gives three modes by which a nation may enlarge its national domain: "(1) By occupation; (2) by treaty and convention; (3) by conquest." (Lib. II, c. IX, s. 11, p. 338.) It is by the second method that the Philippines have become a

part of the territory of the United States, and the right of our national government thus to extend its bounds has never been, nor can it ever be, called in question by any other nation.¹

It is a matter of common history that sovereign states have been wont, from the earliest times, thus to enlarge their national domains, and their right to do so is unquestioned, if we except those occasional interferences on the part of the European states, when the balance of power seemed to be endangered. If the power of the United States is subject to any limitations, they must be sought elsewhere than in international law. The only other limitation upon the actions of the United States Government is the will of the sovereign people,—the authors of that government,—as expressed in the Constitution under which it was established, and through which it derives its governmental powers.

It must be admitted that nowhere in the Federal Constitution is authority in express words given to the national government to acquire additional territory. Is such authority granted by implication? Two of the reasons for establishing the Constitution, as given in the preamble, are, "to provide for the common defence and promote the general welfare," and the power to do these two things is given to Congress (Art I, sec. 8). In the same section Congress is empowered "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water," "to raise and support armies," "to provide and maintain a navy," etc. Under Art. II, sec. 2, the President "shall have power by and with the advice and consent of the Senate, to make treaties." Under Art. IV, sec. 3, "new states may be admitted by the Congress into this Union," and "the Congress shall have power to dispose of, and make all needful rules and regulations, respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state." Finally it is provided that "this Constitution and the laws of the United States, which shall be

¹ 1 Phillimore, *Int. Law*, 324 (3d Ed.). Woolsey *Int. Law*, 65 (6th Ed.). W. E. Hall's *Int. Law*, 104 (3d Ed.). 1 Halleck's *Int. Law*, 131 (Baker's Ed.).

made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land" (Art. VI, sec. 2).

In determining whether or not the power to acquire territory is impliedly granted to the federal government in the foregoing sections, we must look to the decisions of the United States Supreme Court,—the interpreter and expounder of the supreme law of the land. The opinions of our early statesmen, as well as those of other recognized authorities on constitutional law, will also be of service in determining this question.

President Jefferson, a strict-constructionist of the old school, expressed the opinion that Louisiana could not be acquired under the existing Constitution, and accordingly recommended its amendment. "Yet he did not hesitate without such amendment to give effect to every measure to carry the treaty into effect during his administration." (4 Jeff. Constitution, 1, 2, 3.) Either Mr. Jefferson in reality believed that there was an implied power to acquire territory, or else he knowingly participated in a gross infraction of the Constitution. We prefer to accept the former hypothesis.

Mr. Justice Story, than whom there is no greater authority on the United States Constitution, says: "As an incidental power, the constitutional right of the United States to acquire territory would seem so naturally to flow from the sovereignty confided to it, as not to admit of very serious question. The Constitution confers on the government of the Union the power of making war and of making treaties, and it seems consequently to possess the power of acquiring territory, either by conquest or treaty. If the cession be by treaty, the terms of that treaty must be obligatory. They are within the scope of the constitutional authority of the government, which has the right to acquire territory, to make treaties and to admit new states into the Union." (Story on the Constitution, sec. 1,287; see also sec. 1,324.)

He would indeed be a rash jurist or statesman, who would set up his opinion on a constitutional question in opposition to Chief Justice Marshall. In the case of the *American Insurance Company v. Canter* (1 Pet. 542), Mr. Marshall pronounced

the following concise decision: "The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory either by conquest or by treaty."

A generation later the same question arose in the celebrated *Dred Scott* case. In the opinion of the court, delivered by Chief Justice Taney, "the power to expand the territory of the United States by the admission of new states is plainly given; and in the construction of this power by all the departments of the government, it has been held to authorize the acquisition of territory not fit for admission at the time."¹ We may dissent from the rulings on several points of this case and a great part of the decision is no longer law, but the conclusions reached on this particular point are thoroughly in accord with the utterances of the court in the earlier cases, and have since been uniformly followed in numerous decisions of the United States Supreme Court.²

Throughout the history of the United States the actions of the legislative departments of the federal government have been in accord with what we have just seen has been the uninterrupted current of judicial opinion. Beginning with a small strip of territory along the Atlantic coast, the federal government, almost as soon as established, began to acquire lands to be governed as territories by inducing the individual states to cede to it their unoccupied possessions lying to the west and extending to the Mississippi River.

In 1803, Napoleon, having first acquired the vast territory of Louisiana from Spain by a treaty, the terms of which have never been made public, ceded it to the United States. This was the consummation of a cherished purpose of the Corsican, as may be gathered from his words to President Jefferson on the exchange of ratifications of the treaty. "This acquisition of territory," said he, "strengthens forever the power of the United States. I have just given England a maritime

¹ *Dred Scott v. Sandford*, 19 How. 447.

² *Sere v. Pitot*, 6 Cranch 332; *Fleming v. Page*, 9 How. 614; *Cross v. Harrison*, 16 How. 191; *New Orleans v. Armas*, 9 Pet. 224; *Mormon Church v. United States*, 136 U. S. 42.

rival that will, sooner or later, humble her pride." Soon afterwards, the national domain was further enlarged by the acquisition of Florida from Spain, by treaty of cession, in 1819. Texas was annexed in 1845, and three years later the vast territory, forming the southwest quarter of the United States, was ceded by Mexico, thus extending the dominion of the Federal Union from ocean to ocean, fifteen hundred miles in width. The lower part of the present territory of Arizona was added by the Gadsden treaty in 1854, while Russia practically presented to the United States her American possessions when she ceded Alaska in 1867. For thirty years the boundaries of the United States remained unchanged. In 1898 the Hawaiian Islands were annexed, and now by the Treaty of Paris other islands, both in the Pacific and in the Atlantic, have passed into the possession of the United States. This steady extension has not been the work of any one political organization, but has been wrought now by one party, now by another.

THE POWER OF THE UNITED STATES TO GOVERN ACQUIRED TERRITORY.

It is not for us to say whether we would have been a stronger, a more prosperous and a happier nation to-day, had we remained within our original boundaries east of the Mississippi River. The extension of our boundaries is a *fact*. The acquisition of the Philippine Islands is a *fact*. The next question which confronts us is, "what disposition shall be made of them?" And first a few words as to the power of the United States to govern these islands. "As the general government possesses the right to acquire territory, either by conquest or by treaty, it would seem to follow, as an inevitable consequence, that it possesses the power to govern what it has so acquired. The territory does not, when so acquired, become entitled to self-government, and it is not subject to the jurisdiction of any state. It must consequently be under the dominion and jurisdiction of the Union or it would be without any government at all." (Story on the Const. sec. 1324.) Chief Justice Marshall, speaking for the Court in *Sere v. Pitot* (6 Cranch 336) holds that "the power of governing and of

legislating for a territory is the inevitable consequence of the right to acquire and to hold territory." And again in *American Insurance Co. v. Canter* (1 Pet. 542), the same conclusion is reached. "Perhaps," says the Chief Justice, "the power of governing a territory belonging to the United States which has not by becoming a state acquired the means of self-government, may result necessarily from the facts, that it is not within the jurisdiction of any particular state and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, *the possession of it is unquestioned.*" This power, which was so early pronounced to be "unquestioned," has not only been recognized with equal emphasis in the later decisions of the Supreme Court (See *United States v. Gratiot*, 14 Pet. 526; *McCulloch v. Maryland*, 4 Wheat. 422; *Scott v. Sandford*, 19 How. 393; *Cross v. Harrison*, 16 How. 164; *Mormon Church v. United States*, 136 U. S. 44; *Shively v. Bowlby*, 152 U. S. 48; *Murphy v. Ramsay*, 114 U. S. 44), but has been exercised as is well known in the government of the territory acquired by the various treaties above mentioned.

The power to acquire and to govern territory being so unmistakably included among the functions of our federal government, the next question is, "*how* shall our acquired territory be governed?—how shall the Philippines be governed?"—for we can perceive no reason why a different rule should be adopted with reference to those islands, than with reference to Hawaii, Alaska or our territories in the Southwest. Congress is empowered to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States. No reference being made to the location of the acquired territory, the distant islands of the Pacific come as completely within the provisions of this section as does Oklahoma, surrounded on all sides, as she is, by the states and territories of the Union. So broad indeed is the Constitution on this point that, should it ever become practicable and desirable to annex one of the planets, we submit that no amendment to the Constitution would be necessary to authorize such acquisition, or to empower Congress to establish a government for it.

THE POWER OF THE PRESIDENT TO ESTABLISH A TEMPORARY
GOVERNMENT FOR THE PHILIPPINE ISLANDS.

Leaving out of consideration, for the purposes of this article, the rights of the present inhabitants of the Philippines to govern themselves without interference from any nation whatever, we find the United States the unquestioned owner of those islands, with plenary power to dispose of or to govern them. The next question to be determined is "how shall they be disposed of? or how shall they be governed?"

For two reasons, the LV. Congress did not adopt any regulations, or establish any government for the Philippine Islands: first, because our rights therein had not yet become complete by the exchange of the treaty ratifications; and secondly, because of the state of insurrection which then existed, and which still continues there—formerly against the Spanish Government, now against the United States.

Under the Constitution, "the President shall be Commander-in-Chief of the Army and Navy of the United States and of the militia of the several states, when called into the actual service of the United States." (Art. II, Sec. 2.) It therefore becomes the duty of the President, as Commander-in-Chief of the Army and Navy, to establish a temporary military government until the cessation of hostilities.

The Territory of New Mexico having been acquired by the arms of the United States, in 1846, and the civil government of that territory having been overthrown, General Kearney, "in virtue of the power of conquest and occupancy, and in obedience to the duty of maintaining the inhabitants in their persons and property, ordained under the sanction and authority of the United States, a provisional or temporary government for the acquired territory." The power to do this was upheld in *Leitensdorfer v. Webb* (20 How. 178), in which it is further held that the "ordinances and institutions of the provisional government" continued even after peace was restored until "revoked or modified" by Congress. In the case of *The Grapeshot* (9 Wall. 129), Chief Justice Chase pronounced the opinion that during the Civil War, "it became the duty of the national government, whenever the insurgent power was overthrown and the territory

which had been dominated by it, was occupied by the national forces, to provide as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice. The duty of the national government, in this respect, was no other than that which devolves upon the government of a regular belligerent occupying, during war, the territory of another belligerent. It was a military duty, to be performed by the President as commander-in-chief, and entrusted as such with the direction of the military force by which the occupation was held."¹

The power of the President to authorize the "military and naval commander of our forces in California (in 1847) to exercise the belligerent rights of a conqueror, and to form a civil government, for the conquered country, and to impose duties on imports and tonnage as military contributions for the support of the government and of the army which had the conquest in possession" was upheld in *Cross v. Harrison* (16 Wall. 190).² Were the question now to arise for the first time, there could be little doubt in the mind of any one of the power of the President to maintain a temporary government, until the cessation of hostilities, and until the establishment of a permanent form of government by Congress. So strongly supported, both on principle and authority, and so firmly established by usage, this power of the President can be no longer open to question.

THE PERMANENT GOVERNMENT OF THE PHILIPPINE ISLANDS.

When hostilities in the Philippines shall have ceased, and therewith the necessity for a military government, what disposition shall then be made of those islands? We conceive that four courses will be open to Congress, when it comes to consider the matter, any one of which is within its *power* to adopt, so that in choosing one, only questions of national policy need be considered by it. (1) Congress may cede to some other nation her rights in the Philippine Islands. (2) Congress may authorize the immediate withdrawal of all

¹ *The Grapeshot*, 9 Wall. 129.

² See also 1 Halleck's Int. Law, p. 498, 503 (Baker's Ed.); U. S. Stat. at Large, 55th Cong., p. 750.

American troops and leave the inhabitants to work out their own destiny. (3) Congress may extend the protection of the United States over these islands, either temporarily or permanently. (4) Congress may govern these islands as territories of the United States.

The first possibility may be dismissed with a word. The United States is not dealing in foreign real estate as a speculation, nor is it her purpose to free the inhabitants of the Philippines from subjection to one power, only to place them in bondage to another. The second course is equally out of the question, since the part which the United States has taken warrants the other nations of the world in expecting her to see that a government of some kind shall be established in the Philippines of sufficient stability to afford protection to their countrymen domiciled there and to their commerce with those ports. Should the islands, under the third alternative, eventually become an independent government, a consideration of their future would be irrelevant here, consequently we shall consider the future government of the Philippines under the fourth proposed system, which seems, on the whole, most likely to be adopted.

The disposition which is to be made of the Philippine Islands should not be difficult to forecast, if we can trust our national legislature to restrain its actions within constitutional limitations. The normal condition of the several political entities, which go to make up our Union, is that of distinct and individual states, each with its own local government, limited in its powers by the Federal Constitution as well as by its own. Outside of the several component parts of the Union known as states, there lie certain lands not within the domain of any state, yet within the national boundaries. These lands comprise the territory spoken of in the Constitution, of which Congress shall have power to dispose and respecting which Congress shall have the power to make all needful rules and regulations. (U. S. Const., Art. III, Sec. 2.)

When territory is ceded to the United States it does not become *ipso facto* a state in the Union, for new states can be admitted only by the Congress. (Id., Art. III, Sec. 1.) Such acquisitions do become a part of the territory and, as such,

are subject to such disposition and regulations as Congress may see fit to make respecting them. The people of a state owe allegiance to two governments, one state the other national, but over the people of a territory "Congress exercises the combined powers of the general and of the state governments." In *American Ins. Co. v. Canter* (1 Pet. 542), Chief Justice Marshall held that Florida, until admitted as a state, "continues to be a territory of the United States, governed by virtue of that clause in the Constitution, which empowers Congress to make all needful rules and regulations respecting the territory or other property of the United States." Aside from the District of Columbia and the small reservations for forts, federal buildings, etc., on one hand, and the states on the other, the national government recognizes no land in possession except her territories, as mentioned in the Constitution. Whether it is within the power of Congress to govern the national territory permanently as such, or only temporarily until it shall become fitted to take upon itself the duties of state government, and to take its place in the Union of states, need not here be considered, since nothing could possibly be gained by a determination of the question. Any one who is acquainted with the rapid development of our western territories would scarcely presume to say that *any* territory could never become admissible into the Union of states. Considering climatic conditions, accessibility and general productiveness, who will say that Luzon may not be ready for admission to statehood in advance of Alaska?

The power of Congress over national territories cannot be made to depend upon their future capability of admission as states, much less upon their *supposed* future unfitness for statehood. Should the Philippine Islands therefore be retained by the United States it will be the duty of Congress to make such rules and regulations respecting them as will give them a stable government, and afford ample protection to life and property. Congress, in the exercise of its constitutional power to govern the territories, may do so mediately or immediately; either by the creation of a territorial government, with power to legislate for the territory, subject to such limitation and restraint as Congress may impose upon it, or by the passage

of laws directly operating upon the territory without the intervention of the subordinate government.¹ It must be evident that, with the exceptions mentioned above of the reservations for strictly governmental purposes, the lands of the United States which have not yet been admitted to statehood consist of three organized territories—New Mexico, Arizona and Oklahoma—the unorganized Territory of Alaska, the Indian Territory, which is a political anomaly, the Hawaiian Islands and our recent acquisitions from Spain, whose government has not yet been definitely determined by Congress, but which must be governed either as organized or unorganized territories. Such has been the history of our territorial governments, and it is safe to say that no new mode of government will be attempted, even if permitted by the Constitution and laws of the United States.

Speaking of the territory acquired from France in 1803, Chief Justice Taney said: "The form of government to be established necessarily rested in the discretion of Congress. It was their duty to establish the one that would be best suited for the protection and security of the citizens of the United States and other inhabitants who might be authorized to take up their abode there, and that must always depend upon the existing conditions of the territory, as to the number and character of its inhabitants and their situation in the territory. In some cases a government consisting of persons appointed by the federal government would best subserve the interests of the territory when the inhabitants were few and scattered and new to one another. In other instances it would be advisable to commit the powers of self-government to the people who had settled in the territory, as being the most competent to determine what was best for their own interests. But some form of civil authority would be absolutely necessary to organize and preserve civilized society and prepare it to become a state; and what is the best form must always depend on the condition of the territory at the time and the choice of the mode must depend upon the exercise of a discretionary power by Congress, acting within the scope of its constitutional authority, and not infringing upon the rights of person or

¹ *Edwards v. Steamship Panama*, 1 Ore. 423.

rights of property of the citizen who might go there to reside or for any other lawful purpose. It was acquired by the exercise of this discretion and it must be held and governed in like manner until it is fitted to be a state."¹

Much light is thrown upon the subject of the relation of the territories to the Union by the concise opinion of Chief Justice Chase in *National Bank v. Yankton* (101 U. S. 133): "All territory within the jurisdiction of the United States, not included in any state, must necessarily be governed by or under the authority of Congress. The territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective states, and Congress may legislate for them, as a state does for its municipal organizations. The organic law of a territory takes the place of a constitution as the fundamental law of the local government." Citing this case with approval in *Mormon Church v. United States* (136 U. S. 42), Mr. Justice Bradley held that "the power of Congress over the territories of the United States is general and plenary," while in the case of *Murphy v. Ramsey* (114 U. S. 44), the court considered the question of the power of Congress over the territories to be no longer open to discussion, it having "passed beyond the stage of controversy into final judgment."²

THE STATUS OF THE INHABITANTS OF THE PHILIPPINE ISLANDS.

It being in the power and discretion of Congress to govern the Philippines either directly from Washington or indirectly through the medium of a local territorial government, subject to the Constitution and laws of the United States, we come next to consider what shall be the rights and privileges of the individual inhabitants of those islands, and first of all, their political rights. It is clear that their political rights, or rather privileges, must depend largely upon whether Congress shall decide to govern them immediately or to grant them a local

¹ *Scott v. Sandford*, 19 How. 448. See also *ex parte Perkins*, 2 Cal. 424.

² See *Amer. Ins. Co. v. Canter*, 1 Pet. 511; *Benner v. Porter*, 9 How. 235; *Forsyth v. U. S.*, 9 How. 571.

territorial government. Should the former method be adopted, then they would have no political privileges, while under an organized territorial government, their privileges would be just such as Congress should in its discretion, grant to them, and their legislative powers would "extend to all rightful objects of legislation, not inconsistent with the laws and the Constitution of the United States."¹

Speaking of the inhabitants of the territories, the court, in *Murphy v. Ramsey* (114 U. S. 44), said: "Their political rights are franchises, which they hold as privileges in the legislative discretion of the Congress of the United States." In cases of cession by treaty "the ceded territory becomes a part of the nation to which it is annexed, either on terms stipulated in the treaty, or on such as its new master shall impose. Their relations with their former sovereign are dissolved and new relations are created between them and their new sovereign. The act transferring the country transfers the allegiance of its inhabitants. They do not participate in political powers, nor can they share in the powers of the general government, until they become a state."² "The law which may be denominated political is necessarily changed." (Id.) The political destiny of the inhabitants of the Philippines, being exclusively and absolutely entrusted to the discretion of Congress—in other words, Congress having plenary power to define what shall be their relations to their new sovereign, the United States of America,—our next concern is with their relations with each other. Whatever may have been the usages of nations in ancient times, under the more humane principles of modern international law, the inhabitants of acquired territory are no longer put to the sword, nor cast into prison, nor deprived of their private property. Says Vattel, "the new sovereign takes only the possessions of the state, the public property, while private individuals are permitted to retain theirs."³ "The relations of the inhabitants with

¹ *Mormon Church v. U. S.*, 136 U. S. 44. See also 9 U. S. Stat. 454.

² Story on the Constitution, Sec. 1234; *American Ins. Co. v. Canter*, 1 Pet. 542; 1 Halleck's Int. Law, p. 380, (Baker's Ed.); 2 Wharton's Digest of Int. Law, p. 425.

³ Law of Nations, p. 388.

each other do not change. The general laws, not strictly political, remain as they were until altered by the new sovereign."¹ The law which "regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the state."² It is true that stipulations are often inserted in treaties of cession, securing to the inhabitants of the ceded territory, their rights in private property, but this is only done out of abundant caution, since the same rights are secured to them under the law of nations, "whether or not it is so stipulated in the treaty of cession."³

These cases were cited and followed in an able opinion by Mr. Justice Daniel, in *Leitensdorfer v. Webb* (20 Hos. 177). Referring to the acquisition of New Mexico, he says: "By this substitution of a new supremacy, although the former political relations were dissolved, their private relations, their rights vested under the government of their former allegiance, or those arising from contract or usage remained in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States or with any regulations which the conquering and occupying authority should ordain. For example, the right of property in slaves would be recognized in no territory which might be acquired by the United States, slavery being forbidden by the Thirteenth Amendment to the Constitution of the United States."

Life, liberty and property being, by the principles of international law, secured to the inhabitants of the Philippine Islands, and the right to religious freedom being guaranteed to them by the terms of the treaty (Art. X), what further rights or privileges can they lay claim to? Thus far all the inhabitants have received equal consideration, whether European, Asiatic or Oceanic, but Article IX of the treaty stipulates for superior advantages in favor of "Spanish subjects, natives of the Peninsula," one of which is the right to make an election within one year whether they will retain their allegiance to the crown of Spain or adopt the "nationality of the territory"

¹Story on the Const. 1234.

²American Ins. Co. v. Canter, 1 Pet. 542.

³United States v. Percheman, 7 Pet. 51; Mitchell v. U. S., 9 Pet. 711.

—that is of the United States. Should they elect the latter, they will be entitled to all the privileges and immunities of other citizens of the United States residing in the organized or unorganized territories, as the case may be. The treaty further provides that “the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.”¹

“If the treaty stipulates that they shall enjoy the privileges, rights and immunities of citizens of the United States, the treaty as part of the law of the land, becomes obligatory in these respects.”² But the Treaty of Paris does not so stipulate. In fact it negatives the idea that any such stipulation can be implied, for it explicitly leaves the civil and political rights of the inhabitants to the future determination of Congress. The native inhabitants of the Philippines therefore, are neither citizens possessed of the privilege of suffrage, nor are they citizens without that franchise. Until Congress shall extend and enlarge their privileges, they stand in the position of all other aliens, resident in the territories of the United States, owing certain duties and receiving limited protection from the national government.

The United States, as a sovereign state, has the inherent right to make her own rules and regulations respecting naturalization. Moreover, the power to make such regulations has been specifically entrusted to Congress.³ Congress therefore may enact laws, providing for the naturalization of every inhabitant of the Philippine Islands, or it may admit certain classes to the privileges of citizenship, while it excludes all others. As to such as shall not become citizens, their rights are limited to such as are secured to them by the laws of nations and by the terms of the treaty. As to those who may become citizens under the authority of Congress, their rights will be identical with those of all other American citizens resident in our territories, and all the privileges and immunities which the Constitution guarantees to a citizen of the United States and which do not depend upon his being also a citizen of one of

¹ Article IX.

² Story on the Const. Sec. 1234.

³ U. S. Const., Art. I., Sec. 8.

the states, will be then extended to the native Philippine inhabitants so naturalized.

The "inalienable rights," and the "privileges and immunities" of the Constitution extend not to aliens but to citizens, and that, too, to naturalized and natural-born citizens equally, whether residents of Arizona, Alaska or the Philippine Islands. Since the Constitution does not guarantee the right of suffrage to all citizens, it follows that the electoral franchise can be exercised only by such of the citizens of the United States as Congress shall see fit to entrust with it.¹ The treaty by which Louisiana was acquired, in 1803, provides (Art. III) that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible according to the principles of the Federal Constitution to the enjoyment of all rights, advantages and immunities of citizens of the United States; *and in the meantime* they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess." Clearly the constitutional privileges did not extend to the inhabitants of the Territory of Louisiana until admitted into the Union.

Article VI of the Florida treaty is a trifle ambiguous—"shall be incorporated into the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights and immunities of the citizens of the United States,"—but it seems clear that the inhabitants were to become citizens only when admitted to statehood, unless citizenship should be sooner conferred upon them by act of Congress. Article VIII of the Treaty of 1848 with Mexico, contains practically the same provisions with reference to the inhabitants of the territory thereby ceded. The question of the applicability of the Federal Constitution to the national territories was soon afterwards settled by act of Congress, as follows: "The Constitution and all laws of the United States which are not locally inapplicable, shall have the same force and effect within all the *organised* territories and in every ter-

¹ *Miner v. Happersett*, 21 Wall. 162.

ritory hereafter organized, as elsewhere in the United States."¹ Could anything be plainer than the intention of Congress to exclude *unorganized* territory from the "force and effect" of the Constitution?

The next territorial acquisition of importance was that of Alaska in 1867. The third article of the Treaty of Cession is so similar to the ninth article of the treaty by which the Philippines were acquired, that it may well be quoted here: "The inhabitants of the ceded territory, according to their choice, preserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized tribes, shall be permitted to the enjoyment of all the rights and advantages and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of that country." On the acquisition of Alaska, only the Russians could, by the treaty, become United States citizens, the status of all others must be regulated by Congress. On the acquisition of the Philippines, only the Spaniards may become United States citizens, "the civil rights and political status of the native inhabitants shall be determined by Congress."

The Constitution to-day extends over the Philippines to the same extent that it did over Alaska by the treaty of 1867 with Russia. The inhabitants of the Philippine Islands are to-day entitled to the same rights, privileges and immunities as were the native tribes of Alaska under the same treaty. The Constitution and laws of the United States, therefore, do not *proprio vigore*, extend to the Philippines or to any other unorganized territory. Should Congress establish a territorial government in the Philippine Islands, unquestionably the act of 1850 (*supra*.) would extend the Constitution and laws of the United States over all the inhabitants, unless exceptions should be expressly made, but until Congress does establish such a government, or by special enactment extends the

¹ Rev. Stat. U. S., Sec. 1891. (1850.)

provisions of the Constitution to the Philippines, or otherwise provides for their naturalization, the inhabitants of those islands can claim no rights, privileges or immunities under the Constitution.

In the celebrated Slaughter House Cases (16 How. 74), Mr. Justice Miller for the court, speaks as follows: "Of the privileges and immunities of the citizens of the United States, and of the privileges and immunities of the citizens of the state, and what they respectively are, we will presently consider; but we wish to state here, that it is *only the former* which are placed by this clause under the protection of the Federal Constitution." In *Connor v. Elliott* (18 How. 593), it was said: "No privileges are secured by it, except those which belong to citizenship."

The right to come to the seat of government and to pass freely from one state to another was held, in *Crandall v. Nevada* (6 Wall. 44), to belong to *citizens* of the United States. In a word, the privileges and immunities of the Constitution are guaranteed, not to every one who happens to be or to come within the national boundaries, but only to citizens of the United States.

Let Congress grant citizenship indiscriminately to the white, black, yellow and brown races of the Philippine Islands, and unquestionably they will then have no power to exclude them from coming to the continent or from the enjoyment of any other constitutional right or privilege, but until such legislation by Congress, the Constitution of the United States extends no greater privileges to the peoples of the Philippine Islands than to the savage tribes of Alaska.

Chicago.

Frank J. R. Mitchell.

IS "INTANGIBLE" PERSONAL PROPERTY OWNED
BY ESTATES OF NON-RESIDENT DECE-
DENTS LIABLE TO TAXATION IN
PENNSYLVANIA?

Taxation, defined as a "system of forced contribution to meet the expenses of the government, whether national or local," (Hadley, Economics 449) with its important and various divisions and propositions, *e. g.*, of subjects and objects, of fairness, of popular endurance, of net results, and largely of "appropriations," is an interesting study, not only to practical politicians, but to philosophical minds—and even to the taxpayer. To the lawyer in active practice the questions arising under these laws are not those of governmental theories or of political economy. He is usually concerned to resist a specific claim made against a particular client or a number of clients whose interests are the same. The constitutionality of an Act of Congress may be attacked, for example the late Income Tax, the Succession Law of 1898, or a State statute, as the Direct Inheritance Tax of 1897 in Pennsylvania. Frequently, however, counsel try to show that the legislation failed to cover the case under discussion; that its particular facts are not within the language of the law.

Such an attempt has failed in New York and the "Transfer Tax Act" [L. 1892 c. 399] (an inheritance taxation) was held to cover bonds and stocks belonging to non-residents and deposited within the State for safe-keeping, and also extended to bank deposits there payable to non-residents (Matter of Bronson, 150 N. Y. 1; Matter of Whiting, 150 N. Y. 27; Matter of Houdayer, 150 N. Y. 37).

This abrogates by statute, and the judicial construction thereof, the old and well settled doctrine of the location of these particular kinds of personal property, (expressed in the maxim "*mobilia personam sequuntur*,") and a glance at these New York cases naturally suggests an inquiry into the law of Pennsylvania. As the point involved turns upon the non-residence of the owner, we may also consider the case of a

non-resident trustee of an estate as hereinafter set forth. It is true that in theory no form of tax is more easily borne than a succession tax. One who gets his plum without even the trouble of going into a corner to put in his thumb ought readily to hand over a small slice for the common good, and the more remote his kinship to the maker of the pie, or in case of no relationship at all, the more cheerfully should he enlarge the piece; but this mental acquiescence is rare. It is not, however, with the subjective aspect of the matter, nor yet with the objective advantages based upon the facility of discovery and collection by means of inventory and appraisement, accounting and the vigilance of courts of probate, or even with the averred unfairness of double taxation, (at the domicile and also in another State) that the present paper is concerned. The purpose is to consider two questions which seem related to each other by the common point of non-residence. They may be thus stated, to wit:

1. Where a person, not residing in Pennsylvania, dies leaving securities of the kind described (*i. e.*, choses in action, or deposits of money), which he has lodged in Pennsylvania for safe-keeping, is any inheritance tax upon these securities or their transfer payable in Pennsylvania?

2. Where a Trustee or Executor, who is not a resident of Pennsylvania, deposits in that State for safe-keeping such securities of the estate of a person who was also not a resident of Pennsylvania, does the Trustee or the Trust Estate become liable for annual city taxes in Philadelphia, or State taxes to Pennsylvania?¹

It is believed that both questions should be answered in the negative; that is, in neither case, as stated, is there any liability to taxation in Pennsylvania under existing legislation.

¹ These were recently put to the writer, and they suggested the study whose results are here given. This article treats solely of the law in Pennsylvania. For the statute in Massachusetts and its construction, see *Callahan v. Woodbridge*, 171 Mass. 595, and cases therein cited, and generally as to the place of taxation of personal property examination of the recent case, *New Orleans v. Stemple*, 20 S. C. Rep. 110, (with *People ex rel. Jefferson v. Smith*, 88 N. Y., 576, and *Estate of Jefferson*, 35 Minn. 215), is suggested. For this last citation, the writer is indebted to Judge Jaggard, of St. Paul, Minn.

The first thought is that the mere bailment, or deposit of securities, without any other evidence of change of ownership, legal or equitable, does not alter their status. They belong to the estate of the decedent in the one case or to the trust estate in the other without regard to the place of custody.

An analogy may be found in the facts reported in *Shakespeare v. Fidelity Trust Co.*, 97 Pa. St. 173. J. B. Ackley, who was domiciled in New Jersey at the time of his death in September, 1874, had deposited on August 6, 1873, and at other times, with the Fidelity Insurance Trust and Safe Deposit Company of Philadelphia, U. S. 5-20 bonds of the face value of \$17,400 and received therefor a certificate of deposit. He left a will upon which letters testamentary were duly granted by the surrogate of Burlington County, N. J., to Ransom Rogers, the executor therein named. The certificates were presented by Rogers to the Trust Company and the bonds were delivered by it to him. Subsequently letters of administration d. b. n. c. t. a. were granted in Philadelphia to James Shakespeare, who sued the Trust Company for the bonds—the action being trover and conversion. The verdict was for the plaintiff, but the court entered judgment for the defendant on the point reserved, to wit, that the plaintiff was not entitled to recover upon the facts found. On error the Supreme Court affirmed the judgment. Sharswood, J., said: "There is another point, which, we think, disposes of the question upon this record. We do not consider that the United States coupon bonds, which are the subjects of this controversy, were at the time of the death of the decedent any part of his estate in this Commonwealth. The defendants were the mere depositaries of the bonds for safe-keeping. They were therefore in the possession of the decedent. He held the certificates of their deposit. The defendants were bound to restore the bonds at any time. It was as if the bonds had been placed in a fire-proof of the defendants, of which the decedent possessed the key. In point of fact the certificate was in the actual possession of the widow of the decedent in New Jersey. She surrendered it as she was bound to do to the foreign executor. She could not have withheld it. The New Jersey executor could have sued her, and compelled its delivery to him. The Pennsylvania administrator certainly could not."

It is a duty, however, to examine the statutes relating to taxation. There are, it may be said, in a general way, three lines of taxation in this State. The Collateral Inheritance Tax is one. The taxation of personal property for State purposes is another. The third is the taxation of real estate for municipal purposes, the rate being annually fixed by City Councils, and this is not pertinent to our inquiry.

As a matter of interest it may be noted that there was an effort to establish a system of Direct Inheritance taxation by an Act of May 12, 1897, P. L. 56, but the statute has been declared unconstitutional: *Cope's Estate*, 191 Pa. 1, and following cases, *id.*

The present statute which applies to the first question is that of May 6, 1887, P. L. 79, entitled "An act to provide for the better collection of collateral inheritance tax." It is, in part, as follows: "All estates, real, personal and mixed, of every kind whatsoever, *situated* within this state, whether the person or persons dying seised *thereof be domiciled within or out of this state*, and all such estates situated in another state, territory or county, when the person or persons dying seised thereof, shall have their domicile within this commonwealth, passing from any person to any person or persons . . . other than to or for the use of father, mother, husband, wife, children and lineal descendants born in lawful wedlock, or the wife or widow of the son of the person dying seised or possessed thereof, shall be . . . made subject to a tax of five dollars on every hundred of the clear value of such estate or estates." Prior statutes of this State, which are codified in this act, are referred to and compared in a very careful and able opinion by Judge Penrose, of the Orphans' Court of the County of Philadelphia: *Del Busto's Estate*, 23 Weekly Notes of Cases 111. He shows that the section of the existing act, just recited, did not introduce a new subject of taxation. Therefore, decisions of the Supreme Court interpreting and applying those statutes are authoritative in considering questions under the Act of May 6, 1887, the last legislation upon the subject. The principle of the decisions is the familiar one that the situs of personal property follows the domicile of the owner: *Orcutt's Appeal*, 97 Pa. 179. See

McKeen v. Northampton, 49 Pa. 519, opinion of Agnew, J., p. 530.

A striking case is that of the Appeal of the Commonwealth of Pennsylvania, 11 Weekly Notes of Cases 492. A decedent had been in her lifetime a resident of Cuba. Her will was admitted to probate in Cuba, but ancillary letters were taken out in Pennsylvania. By her will her estate was divided among collaterals. The assets consisted of various municipal, government and corporation bonds, all American in issue, amounting to a large sum. Held, upon the adjudication of the account of the administrator in Pennsylvania, that these securities were not liable to the collateral inheritance tax. The Commonwealth appealed to the Supreme Court. In a *per curiam* opinion the court held that the Act of April 10, 1849, which we have seen to be substantially the same as the present Act of 1887, and which provided that if any person or persons having their domicile in another State, territory or country "shall die leaving real or personal estate within this commonwealth, the said estate, whether real or personal, shall be subject to the payment of the collateral inheritance tax," was intended to embrace only personal property of a tangible nature, and not mere evidences of indebtedness which have no situs, but follow the owner's domicile.

Hawkins, P. J., of the Orphans' Court of Allegheny County, stated the law and distinguished it in regard to the special property which was the subject of the claim for tax in the case before him: *Coleman's Estate*, 159 Pa. 231. He said: "The solution of the question involved in this case turns mainly upon the application of the maxim that the situs of personal property follows the domicile of the owner. It was said in *Small's Estate*, 151, Pa. 1, that as a general rule intangible personal property of a non-resident, such as bonds, mortgages and other choses in action, is governed, as to its situs, by the fiction of law above noticed, and hence such property is not subject to collateral inheritance taxation under the Act of 1887, because not situated in this State. Some species of personal property, it is true, when used in carrying on business or for other particular purposes, may have an actual as distinct from a legal situs; but the local character of

the use takes it out of the operation of the rule. And of this Small's Estate is of itself a striking illustration. Not only was the 'thing' given employed in a business which was by its nature localized, but the manifest intent of the testator was that it should remain in this State. The bequest was specifically of testator's interest, including 'all the property real and personal, notes, stocks, bonds and accounts,' in a limited partnership organized under the laws, and having its principal place of business in this State. The value of the property depended largely upon its continuance here. There was no reason for its conversion and transmission to the testator's domicile, and it was given to the surviving partner as such in specie. The facts plainly made an exception to the general rule. The actual situs was here, and liability to the tax followed. It is urged upon behalf of the Commonwealth that this case rules the present; but the facts differ in material respects. The gift here was of an interest in a fund whose distribution belonged to the domicile of the donor."

Orcutt's Appeal is approved in Lines' Estate, 155 Pa. 393. The language of the statute seems clear. As was said by Judge Penrose in Del Busto's Appeal, *supra*, the principle that choses in action have no situs in the State ". . . has been incorporated in the new statute by express enactment; and the only property, real or personal, of non-residents now subject to the tax, is, in terms, declared to be that which has a 'situs' or is 'situated' in the State, thus excluding, under the familiar maxim, that which is not so situated. Nothing could be more significant of the legislative intent to adopt the doctrine of Commonwealth's Appeal (the justice and sound policy of which have never been questioned), than this substitution of a word implying tranquillity and locality instead of the loose and more comprehensive expression 'being in,' used in the prior acts."

It is to be observed that in the Del Busto Case the estate consisted of stocks and bonds of companies incorporated under the laws of Pennsylvania and doing business therein, and of cash awarded to the accountant by the Orphans' Court of Philadelphia. No distinction can be found in the opinion of Judge Penrose between the bonds and the other assets. Rep-

resenting the court in banc, he considered the question of the collateral inheritance tax with much care, and sustained the exceptions to the adjudication which he had made himself (*pro forma*) when sitting as auditing judge.

Now turning to the second question, it may be considered as the following inquiry: If a person must have a domicile in a State in order to be taxed by it, and if intangible choses in action follow the situs of their owner, is there any statute in Pennsylvania which imposes a tax on securities whose paper evidence (*e. g.*, bonds, certificates of stock, mortgages, etc.) are here simply on deposit, the legal and beneficial owners being residents of another State? Our contention is not now against the validity of such an enactment, if it have been made, but it is that no such law exists.

The Act of Assembly of June 8, 1891, P. L. 229, must be examined. By its title and preambles and in its terms it is a supplement to an act entitled "An Act to provide revenue by taxation," approved June 7, 1879, and the Act of June 1, 1889, and amends the same. It provides a system of taxation for State purposes and is comprehensive in its provisions. A number of sections relate to corporations, joint-stock associations and limited partnerships, specifying the reports to be made to the Auditor-General, the appraisement, the rate of the tax, the settlement, etc., etc., which do not bear upon our inquiry. The first section is in these words, in part: "Be it enacted, etc., That from and after the passage of this Act, all personal property of the classes hereinafter enumerated, owned, held or possessed by any person, persons, co-partnership or unincorporated association or company, resident, located or liable to taxation within this Commonwealth or by any joint-stock association . . . whether such personal property be owned, held or possessed by such person or persons . . . in his, her, their or its own right, or as active trustee, agent, attorney-in-fact or in any other capacity, for the use, benefit or advantage of any other person, persons, . . . is hereby made taxable annually for State purposes at the rate of four mills on each dollar. . . ."

The subjects of taxation are "all moneys owing by insolvent debtors, whether by promissory note, or penal or single

bill, bond or judgment, all articles of agreement and accounts bearing interest; all public loans, whatsoever, except those issued by this Commonwealth or the United States; all loans issued by or shares of stock in any bank, corporation, association, company or limited partnership, created or formed under the laws of this Commonwealth or the United States or of any other State or government. . . ."

The pertinent words are ". . . held or possessed by any person or persons, co-partnership or unincorporated association or company . . ." (a) "*resident*," (b) "*located*," (c) "*or liable to taxation within this Commonwealth*." The terms of our second question exclude (a) and (b), and the rulings heretofore cited place (c) on the basis of the other two descriptions, *i. e.*, liable at the time of the passage of the Act. No *new definitive liability is set out* in this section. If it be necessary to express the meaning of (c), it may be interpreted to refer to taxables *ejusdem generis* with those "*resident*" or "*located*;" or, since subsequent sections apply to corporations organized under the laws of other States or territories, but doing business or having capital or property employed or used in this Commonwealth (see Section 5), it may embrace that class of taxables. An expression of such indefinite breadth as "*liable to taxation within this Commonwealth*," should not be construed to *create a novel liability*. The care with which property held *in trust* by residents for non-residents is specified to be taxable, supports the proposition that there was no intention to tax securities whose owners (trustees or *cestuis que trustent*) are domiciled outside of Pennsylvania, who have within her borders neither "local habitation nor name."

Two authorities, though they may be distinguished from the facts of our present discussion, afford help in examining the Act of 1891. *Lewis v. County of Chester*, 60 Pa. 325, was under the Act of 1846, under which property held by a resident trustee for non-resident *cestuis que trustent* was liable to State tax. A testator domiciled in New York appointed his wife executrix and trustee of property which was situated in New York. She filed her account as executrix in the office of the Surrogate, which was allowed and confirmed and the order

made that she keep the balance invested and retain the same *in trust*, etc. The trustee was domiciled in Pennsylvania and her children, the *cestuis que trustent*, lived with her, and for seven years in the borough of West Chester, in this State. The assets in her hands consisted of United States bonds, Pennsylvania State stock, Philadelphia bonds, and bonds and mortgages, viz., \$17,500 in mortgages in Delaware and Maryland, and \$4,800 in mortgages in Pennsylvania. She was held liable for tax in Pennsylvania only on the amount invested in mortgages in this State. The ground for this limited liability was that she held these particular investments "by a personal contract protected solely by our law."¹ As to the bonds and stock, she was a trustee "under the law of New York and amenable only to the authority of that State. The Act of 1846 does not extend to such a case, but must be confined to the property she has here, *and has subjected to our law by investing it here*:" Agnew, J.

The other case is *Guthrie v. Railway*, 158 Pa. 433 (decided in 1893, under the Act of June 8, 1891). The facts are fully stated by McClung, J., in the lower court (p. 437), but the syllabus sufficiently presents them. A resident of the District of Columbia appointed by will as trustee of his estate a citizen and resident of Pennsylvania, who kept the securities of the estate in the city of Washington. The main beneficiary of the trust was the widow, a resident of Washington, to whom was given an annuity. All the other beneficiaries were residents of Pennsylvania or were presumed to live in this State. Among the assets of the estate were bonds, the interest on which was payable at the office of a Pennsylvania corporation.

¹ But see opinion of Mr. Justice Field in *Foreign Held Bonds Case*, 15 Wallace. On p. 323, . . . "A mortgage being there a mere chose in action, it only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce, by its sale, the payment of his demand. This right has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein, but when held by a non-resident it is as much beyond the jurisdiction of the State as the person of the owner."—Note preceding pages 321–322. Here again, one may turn to another decision, *New Orleans v. Stemple*, 20 S. C. Rep. 110.

These were held liable to taxation in this State. The judge, whose opinion was affirmed by the Supreme Court in a "*per Curiam*," said: "In the present case we have a trust created by the act of the testator, a citizen of Pennsylvania appointed trustee by him, and all that the court of the District of Columbia did was to distribute the property to the party whom the testator appointed to receive it. Thus this testator must be regarded as having voluntarily *given it a situs* for the purpose of taxation within the State of Pennsylvania. It is a trust *recognised by our laws, entitled to and receiving* their protection."

The necessity for a clearly expressed intent to tax may be illustrated by the case of mortgages held by corporations, which were taxable under the Act of 1844, P. L. 486, and the Act of 1846, P. L. 486; but it was decided in 1887, in Loughlin's Appeal, 19 Weekly Notes of Cases 517, that it was exceedingly doubtful whether these acts were in force, or repealed by the Act of June 7, 1879, P. L. 112, June 10, 1881, P. L. 99, and June 30, 1885, P. L. 193, as these last named acts did not, nor did any of them, impose taxes for State purposes upon mortgages owned by corporations. This immensely valuable class of securities so held escaped taxation. It will be observed that the Act of 1891 fully covers such property. The *per Curiam* opinion in Loughlin's Appeal contains a sentence so apposite and sound that it should be quoted (p. 519): "We do not think it is the proper function of the judiciary department of the government to impose taxation, which is a species of confiscation by a strained construction of doubtful legislation. . . ."

The conclusion is that personal property, other than what is known as "tangible," which belonged in his lifetime, to one not a resident of Pennsylvania, possessed by him at the time of his death, is not subject to the Collateral Inheritance Tax of the Commonwealth, even though the certificates or other evidences of the choses in action owned by the decedent's estate are deposited within the State. Further, if such securities (or deposits of money) are retained or placed here by a non-resident executor or trustee, there is not a liability to taxation for State purposes in Pennsylvania.

John W. Patton.

HAMPTON L. CARSON'S ADDRESS.

At the dedication of Price Hall in the new Law School Building of the University of Pennsylvania on the twenty-second of February last, Hampton L. Carson, of the Faculty of the Law Department, delivered the following address :

Mr. Provost, Ladies and Gentlemen—This hall is dedicated to the memory of Eli Kirk Price, a Trustee of the University of Pennsylvania from 1869 to 1884, and of his son, John Sergeant Price, president of the Central Committee of the Alumni of the University from 1882 to 1897, and President of the Society of the Alumni of the Law Department from 1890 to 1897.

As I look forth from this rostrum, the forms and faces of those estimable men appear to my mental vision as distinctly as though they were present in the flesh. Behold ! One of them, a tall, spare, venerable man, of more than eighty years of age, with clear, penetrating eyes beneath shaggy eyebrows, and with a high forehead crowned with locks which swept his shoulders and as white as the driven snow ; the other, a sturdy, thick-set man of but little more than middle age, with a winning smile, a rich, deep voice, and a heartiness of manner which warmed you to the core. They were my friends ; they were the friends of my father, and the duty which I discharge this afternoon is a labor of love. They were men of note in their day and generation ; men of ability, of influence, of usefulness, of character, of integrity and renown. While alive, they were respected by all who knew them, and the memory of their sterling worth is cherished by many friends. They were simple, unobtrusive, modest men ; they led clean, wholesome and honorable lives. They toiled incessantly for the public good, but sought none of the rewards of office. They were lawyers of unusual attainments, who lived up to the best traditions of the profession, who never soiled their palms, or dimmed the record of an honorable calling by a single act which would bring scarlet to the cheek of the most sensitive. To profound professional knowledge they added

an extensive acquaintance with philosophy and science. The elder man was remarkable for the breadth and depth of his insight into all matters affecting our civic welfare; while the younger one devoted himself unselfishly to the promotion of numerous public charities. Their descendants are worthy of their ancestry, and it is to their munificence that we owe this beautiful hall, which is henceforth to be the permanent home of the Pennsylvania Debating Union.

Mr. Eli K. Price was born, two years before the death of General Washington, in the neighborhood of the battle-ground of Brandywine, and his boyish eyes frequently looked upon scenes which have become classic in our Revolutionary annals. He was a sturdy youth, of Welsh, Irish and German descent; his German ancestors coming from the Palatinate of the Rhine. At twelve years of age he was so hardened by the labors of the farm that he was able to reap with a sickle his day's work of twelve sheaves, but he became impatient of the narrow horizon which hemmed him in, and, to use his own language, he escaped from the farm to enter the counting-room. He was employed by the well-known commercial house of Thomas P. Cope, then engaged in foreign trade, whose packets were the largest ships at that time afloat, and one of them I believe exists to-day, engaged in the petroleum trade. From thirteen to at least nineteen years of age he devoted himself to the study of commercial interests, and occasionally would look into books on commercial law and the law of shipping. His attention, however, became diverted little by little from purely mercantile pursuits, until he found himself attracted to the office of a great lawyer, to whose memory he felt that he could pay no more honest tribute of heartfelt respect than to name after his preceptor his own son, John Sergeant. Mr. Sergeant was at that time associated, so far as public estimation was concerned, on fair and equal terms with Horace Binney. In fact, any one whose mind travels back to the great names in that generation which reflect lustre upon the Philadelphia bar would naturally say "Sergeant and Binney." When Mr. Sergeant went to Congress, Mr. Price was a rising lawyer, who, having had the advantages of personal instruction in Mr. Sergeant's office, familiarity with his methods, acquaint-

ance with his clients, and ample knowledge of the details of current litigation, took the whole burden on his young shoulders of conducting successfully, until his distinguished leader's return, a vast and varied practice. These matters occur to me with much of personal interest, for it was my good fortune to read law in the very office, so far as the building was concerned, of the great John Sergeant. The book-cases were still there which had held volumes once conned by Mr. Price, the portraits which hung on the wall recalled the memories of great men and pure citizens, and I often thought of the influences under which Mr. Price laid the foundation of his professional usefulness and renown. But it was not altogether in the field of commercial law, which was Mr. Sergeant's leading line of business, that Mr. Price was destined to succeed. His attention was soon directed to the more difficult branch of real estate, and it is no discredit to any of his predecessors or successors to say that he became in the fullness of time the ablest real estate lawyer that the bar of Philadelphia ever produced. In fact, Mr. Price's signature to a brief of title was far more highly thought of than the policies issued by the great real estate title insurance companies. Mr. Price's single brain carried, stored within its cells, all the extraordinary, accumulated, and detailed learning which is now a part of the corporate plant of every title company in the city. If ever there was a man who knew accurately the history of titles from the time of Penn to the present day, who could run out all the ramifications, whether by deed, by descent, or by special devise, together with all the nice distinctions arising from subtle interpretations of the courts, it was Mr. Price, whose advice, sought upon all occasions, and whose judgment, relied upon by all clients, was frequently appealed to in settlement of matters as arbitrator, where his individual sagacity was preferred by business men to the chances of litigation in the courts. No wonder, then, that by the time he had reached the age of fifty-three years he stood, without rising on his toe tips, with head and shoulders in line with the tallest men in the foremost ranks of the profession. A demand was then made upon him for a public service which this generation and generations yet unborn will learn to

value as one of the most remarkable obligations on the part of posterity to a purely professional man that it has been the duty of professional annalists to record.

Reluctantly—he says it himself—he yielded to a call by his fellow-citizens to allow his name to be used as a candidate for the State Senate in the year 1851. The condition of affairs prevailing in the city of Philadelphia at that time was peculiar. It is not now recalled except by the memory of a venerable man, now nearly one hundred years of age, who still lingers on the scene, who was cherished as a colaborer in the Senate, a partner in many struggles entered into for the public good—I mean the venerable Frederick Fraley, a man, who, with Mr. Price, headed the poll on an independent ticket, for the purpose of emancipating the city of Philadelphia from the chains which bound her. It is a curious chapter in our municipal history. Philadelphia proper was then but two miles square, consisting of twelve hundred and eighty acres of ground, extended from South to Vine streets, and from the river Delaware to the Schuylkill. Outside of this there were nine distinct districts, such as Spring Garden, Kensington, the Northern Liberties, Southwark and Roxborough. There were also thirteen distinct boroughs and four townships, and each of them was under a separate form of government. The county was split into numerous fragments, each boasting of its sovereignty. There were frequent riots and bloodshed in the streets, citizens were massacred because of hatred of men of color or religious antipathies, while conflagrations were kindled by contending factions of firemen for the entertainment of visiting strangers. Philadelphia holidays were graced by free fights in the streets, by the burning of churches, or the riots of 1844; the scenes were reenacted of the Via Appia in the old days of Rome, when the faction of Milo contended with that of Claudius, and when criminals who had violated the laws and ordinances of the city of Philadelphia found immunity in escaping over an imaginary line on the north side of Vine street. The mighty energies of the municipality were paralyzed; her enterprises were dwarfed, and became pinched for want of sustenance and air. Philadelphia, which had been the leading city of the continent, the federal capital in the

days of the Revolution, the metropolis of the Washington and Adams administrations, pined and shrank until it became the fourth city in the Union. Clear-sighted men foresaw that a public service could be rendered to this great county similar in character to that performed by the Federal Convention, when out of thirteen separate sovereignties there was organized and evolved a national government for the boundless territory of the Republic. Mr. Price was a man tall enough "to see the tops of distant thoughts which men of common stature never saw," and looking far into the future he saw the skies brightening with the glow of promise. At the sacrifice of his own individual convenience, at the loss of great professional emolument, at the earnest solicitation of a nonpartisan representation of the citizens, he consented to an election to the State Senate. No words of mine can add force to those which Horace Binney used in a letter written to his own son, when he heard that Mr. Price's candidacy was spoken of, or can exceed them in fitness of eulogy.

"I should think your battle would be half won if you could place Eli K. Price's name, with his consent, at the head of your list. His name is a pledge already given, and not likely to be forfeited, for qualities specially necessary at such a time and on such an occasion: experience in civil affairs, general knowledge, talents, integrity, moral courage, constancy, and conscientiousness. He has, moreover, great *practicalness* and facility that enable him to impress other minds with his own convictions."

Needless to say the ticket was successful, and the Consolidation Act of 1854, the second great charter of our city, the precursor of the Bullitt Bill, was passed largely through his efforts; and what was the effect? The great territories which stretched out on every side, consisting of vacant fields and dilapidated buildings, suddenly, as though from a stroke of the enchanter's wand, sprang up into a great, thriving, beautiful and evergrowing metropolis. The city of Philadelphia became the jeweled bride of the Commonwealth. Many years afterwards, looking beyond the scene of his achievements, and peering, as old men gifted with a touch of prophecy sometimes do, far into the future, Mr. Price predicted, as I

believe no other man has yet done, that the day is not distant when Montgomery and Chester and Delaware counties will knock at the doors of Philadelphia, and pray that all the prosperous boroughs and thriving townships which lie between here and Downingtown, and from Chester to Bristol, should be embraced under one charter of municipal government, which will cause the life-blood of a great community to pulsate through widely articulated veins.

A great statesman was this quiet Quaker lawyer. A great public benefactor, most modest man that he was. Then, taking his pen, and giving to the public, without fee or hope of reward, not even covetous of the benedictions which now rise to the lips of generations which call him "blessed," he sat down and penned that great statute for the unflinching of our titles, known as the Price Act, which has stricken off the fetters which shackled our real estate, and which, in the language of one of our great jurists, has introduced more in the way of practical reform into the law than anything that has occurred since the days of the great case of *Taltarum*.

It was my privilege to be present at a dinner given by the bar of Philadelphia when Chief Justice Sharswood retired from the bench, and laid aside the ermine which he had worn so spotlessly and without reproach for many years. Seated on his right,—I can see him now,—with eager, earnest, benignant face, was Mr. Price, who gazed at the magistrate who had put into the lasting form of judicial expression the principles which he himself had formulated in the office or had stated at the bar, and the Chief Justice, turning to the venerable leader, said, "Mr. Price was not what in England would have been called a conveyancer, but he is fit to rank with the great names of Booth, of Fearne, of Preston and of Hargrave." On the opposite side of the table sat the most renowned of English barristers, then visiting this country, Mr. Sergeant Ballentyne, a man who went all the way to India to defend the Gukwar of Baroda, who rose and said that in the whole course of his professional career—and he had been present at many meetings of the bar at Lincoln's Inn, in the Middle Temple, and at Gray's Inn—he could not recall anything more touching than the manner in which the veteran

leader faced the great Chief Justice, and the Chief Justice paid tribute to the integrity and character of the leader.

I remember also entering a crowded hall, now some thirty years ago, where there was a tumultuous assemblage. It was in the old wigwam in the northern part of the city. A speech was to be delivered by the renowned orator of the black race, Frederick Douglass, and there was great anxiety on the part of all present to hear him. Mr. Price arose to address the meeting, and among the younger generation there were but few who knew who he was, and some disturbance occurred because of the eagerness to hear Douglass. The noise rose almost to the point of tumult; Mr. Price, with the trembling voice of great age, was unable to control it, when the chairman of the meeting rose, and in tones which penetrated to the utmost recesses of the hall, said: "Gentlemen, there are many of you who were not alive when the gentleman who is now addressing you was a faithful and an honored public servant. I simply mention his name in this presence. The man who is now speaking is Eli K. Price." Instantly the feeling of respect was such that there was a hush through the hall, and for fifteen minutes the most rapt attention was paid to the words of one fast verging on eternity: words of political wisdom, words of cheer, words which thrilled the hearts of that vast audience, because all recognized that largely owing to Mr. Price's courageous and persistent advocacy of the cause of freedom it had become possible for a black man to speak without insult or rebuke before an audience in Philadelphia.

Mr. Price did not devote his attention entirely to professional pursuits. As he threw on the shoulders of his affectionate son the burden of the cares of a great office business, he turned his eyes to those shining heights of science and philosophy on which thinkers love to dwell, particularly as they are near the closing scenes of life. Before the American Philosophical Society, before the American Numismatic Society he read papers and discussed the current science of the day. I recall the titles of his papers, "The Glacial Epoch," "Some Phases of Modern Philosophy;" and with a lawyer's well-trained faculties which enabled him in discussion to balance evidence and apply rules, he accomplished

a task which surprised many persons by demonstrating that a lawyer was interested in much beyond the limits of his own profession.

His love of plants and trees found full expression in his work in Fairmount Park, where as a commissioner he labored hard upon the establishment of the Michaux Grove. He himself described the significance of a mound which he himself erected, standing over here within a stone's throw of the campus, a rockery in the shape of a clover leaf, giving us an interesting geological description, thus indicating the extraordinary character of his attainments and the range and versatility of his mind. In 1884, in his eighty-eighth year, he passed away.

The burden of a great business fell on the shoulders of his son, John Sergeant Price, a man who easily sustained the distinction of a great name.

Mr. John Sergeant Price was not as frequently in the courts as some of the other advocates if we confine our attention simply to the Courts of Common Pleas, but in the Orphans' Court, the Court of Probate, I think it safe to say that, during the years in which he appeared there, but few practitioners more frequently or substantially assisted the judges in the discharge of their arduous and intricate duties. But few counselors ever gave to a court the fruits of learning in such abundance. No man ever discharged his debt to his profession with more unselfish and untiring persistence. But few men ever poured forth upon the records such a profuse display of varied ability to deal with complicated accounts, with intricate settlements, and forms of entail. He carried in his heart and in his head the precepts and the learning of his father.

As a man and as a citizen, he illustrated many types of excellence. He was robust in his friendships, earnest in his advocacy of plans for public improvements, and stern in his denunciations of wrong. He wrote his name on the records of no less than eighteen public charities, and during twenty years served as a member of numerous committees, and presided over the meetings of the Central Committee of the Alumni and the Alumni of the Law Department. He was

never known to absent himself from a single meeting or to send a single line of excuse for nonperformance of duty ; he was a man the fullness of whose affectionate nature folded about him the warmest sympathy and loyalty of his friends.

Such were they, father and son, whom we honor to-day. The characters of some men are made of granite ; those of others seem to be but sand and clay. In the action and interaction of the wild waves of life, which sweep in stormy surges through the lives of most professional men, all the perishable parts are washed away, and there appear the rock-ribbed hills, which stand for firmness, for integrity, for nobility of aims, on whose sides can be seen inscribed, in characters to be read by all, the lessons of their lives ; and as they recede in that haze of years which pass one by one like cloud-rifts before us, finally the illumined summits appear on which the eyes love to linger, because they point to an atmosphere of holiness.

Gentlemen of the Pennsylvania Debating Union, it is in memory of good men that this hall is founded. Of what use is it to talk of the examples of noble lives, or of the deeds of those who have "crossed the bar," unless we have ourselves a fixed determination to make our conduct a fair pattern of theirs, and, in the language of Goethe, "So act that the rules of our lives shall become the principles of eternal law." Here on this floor you will contend in debate. You will discuss many strange and arduous questions. The problems of the world are not yet solved, and new situations are presented every day. As I listened this morning to that admirable address in the Academy of Music from the lips of an Oriental, discussing, in our own tongue and without an accent to betray a foreign origin, not only the great problems of the present, but forecasting the probable issues of the future, I felt that no academic occasion of the last hundred years was more significant of results. An Oriental talking in the Occident ! How long will it be before a man from this great, growing, struggling western Republic will talk in the Orient in the tongue of Wu Ting Fang ? What message have we for the children of the sun ? How many subjects of debate are suggested by that single thought, which must be worked out and discussed here ! Remember, gentlemen, it is not dexterity in debate,

nor satisfaction in fleshing your sword in the argument of your adversary, nor simply skill in dialectics that you are alone to acquire. You must search for truth, absolute truth. If we learn aright the lessons so impressively taught us, not only by the addresses and the ceremonies of the last few days, but by the lives of the men whose memories we to-day clasp to our hearts, we must feel that there can be no nobler self-sanctification than to the cause of our God, our country, and truth.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

ATTORNEY AND CLIENT.

Eakin v. People's Hotel Co., 54 S. W. 87, is one of the many cases showing that the reasonableness of an attorney's fee depends as much upon the importance of the controversy as upon the amount and character of the services rendered. In that case the attorney was one of four who conducted a case through the Circuit Court and Circuit Court of Appeals, resulting in a verdict of \$16,000 for his client. The attorney did not actually argue the case, but he watched it all through and gave advice concerning its management. Under these circumstances the Court of Chancery Appeals of Tennessee decided that his claim for a fee of \$800 was not excessive.

An attorney cannot set off an unliquidated claim against his client for services performed in an action against him by the client for money collected for the client: *McCracken v. Harned*, 44 Atl. (N. J.) 959.

BANKRUPTCY.

Is a debt owing by a commission merchant to his principal for goods consigned to be sold on commission, a debt created by "fraud, misappropriation or defalcation, or while acting in a fiduciary capacity," within § 17 of the Bankruptcy Act? Under the acts of 1841 and 1867 several state and lower federal courts decided that commission merchants were fiduciaries, but in *In Re Basch*, 97 Fed. 761, which was the first case on that point under the new act, the District Court (S. D. N. Y.) follows several late decisions of the Supreme Court of the United States in holding that they do not come within the section.

Where, under a state law, a lien is given upon a fund in the hands of any assignee for the payment of debts, such a lien takes precedence in the distribution in bankruptcy without any necessity on the part of the holder of the lien to assert it previously in the state court: *In Re Byrne*, 97 Fed. 762.

BANKRUPTCY (Continued).

The practice of sending attorneys and their clerks to vote at creditors' meetings receives a rebuke from Judge Brown in *In Re Blankfein*, 97 Fed. 191, where he holds that even an attorney at-law is not authorized to vote on behalf of the creditor, but the latter must send his duly constituted attorney-in-fact.

Where the creditors show their inability to elect a trustee by wasting the time of two meetings without coming to any result, the referee may appoint a trustee, and if no objection appears against the person appointed such appointment will be sustained by the court: *In Re Kuffler*, 97 Fed. 187.

BANKS AND BANKING.

Aldrich v. Campbell, 97 Fed. (Circ. Ct. of App., 9th Circ.) 663, is important as throwing some additional light on the

National
Bank,
Assessment
Against
Stockholders
by
Comptroller

vexed question of the conclusiveness of an assessment by the comptroller of the currency upon the stockholders of an insolvent national bank. In this case the receiver of the bank, acting under the instructions of the comptroller, and by virtue of assessments made by him, had brought two actions at law against the stockholder, the total of the two assessments being less than the par value of the stock. The stockholder wished to set up the fact that the sum of the two assessments exceeded the total indebtedness of the bank, but knowing that it would be useless to plead that defence to the action by the receiver, he attempted to make use of a dictum by the Supreme Court of the United States in *U. S. v. Knox*, 102 U. S. 422, which was as follows: "Although assessments made by the comptroller under the circumstances of the first assessment, in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction."

Acting upon this suggestion, the stockholder in *Aldrich v. Campbell* filed a bill in equity against the receiver to enjoin the prosecution of the action at law on the ground above stated, and also upon the ground that the comptroller had exhausted his jurisdiction by the levy of the first assessment. His attempt, however, failed, the court holding (1) that the

BANKS AND BANKING (Continued).

assessments by the comptroller were conclusive upon the stockholder as to the bank's indebtedness, whether the question were raised in law or equity, and that the dictum in *U. S. v. Knox* was to be restricted to the facts of that case, viz., where the comptroller was attempting to make the solvent stockholders liable for the shares of the insolvent stockholders, and (2) that the comptroller could levy as many assessments as he might think necessary, up to the limits of the stockholder's liability. On this last point the court probably overruled *De Weese v. Smith*, 97 Fed. 309, noticed in 39 AMERICAN LAW REGISTER (N. S.) 104, although the case was not mentioned. The decision in the latter case was strongly criticized in 39 AMERICAN LAW REGISTER (N. S.) 185.

BROKERS.

Saule v. Ryan, 53 S. W. 977, will be of interest to business men who are required to take out a license to transact business. A statute of Tennessee rendered it unlawful for real estate brokers to transact business without a license. In an action by a broker for his commission, it appeared that the sale by the broker had been made on January 1, 1898, and that on February 5, 1898, the broker applied for and obtained a license to transact business for one year from January 1, 1898. The Court of Chancery Appeals of Tennessee held that the broker could not recover, on the ground that the subsequent issue of the license could not validate the unlawful transaction, even though the license purported to take effect from January 1, 1898. A decision to the contrary is *Mach. Co. v. Caldwell*, 16 AMERICAN LAW REGISTER (Ind.), 554.

CONSTITUTIONAL LAW.

Upon the ground that it is within the police powers of the state, the Supreme Court of Tennessee has upheld the constitutionality of the so-called "Scrip Act," or act requiring employers to redeem scrip orders for wages in cash: *Harbison v. Knoxville Iron Co.* 53 S. W. 955. The courts of the various states are almost equally divided upon this question, Pennsylvania being one of those in which such an act is unconstitutional. The question does not seem to have been decided by the Supreme Court of the United States, but since *Holden v. Hardy*, 169 U. S. 386, there is a strong probability that this court would recognize the existence of the police power to protect workmen to this extent.

CONTRACTS.

The doctrine that a mistake of a foreign law is to be regarded as a mistake of fact led to an interesting result in *Rosenbaum v. U. S. Credit System Co.* 44 Atl. 967. The defendant engaged the plaintiff in New Jersey to transact credit-insurance for it in Massachusetts, where it was forbidden by law. In an action for breach of the contract, it appeared that the defendant was aware of the Massachusetts law, but that the plaintiff was not. The Supreme Court of New Jersey held that there could be no recovery upon the illegal contract, but that the action of the defendant in concealing from the plaintiff the existence of a material fact, viz., the law of Massachusetts, amounted to a fraud upon the plaintiff, who could recover damages for injury resulting from such fraud.

The Supreme Court of Maine has decided that a contract of employment for a certain time at a stipulated sum per week is an entire contract, for breach of which only one action may be brought. Thus in *Alie v. Nadeau*, 44 Atl. 891, the defendant employed the plaintiff for six months from November 9, 1897, at \$10 per week. On May 12, 1898, the plaintiff, having been discharged, brought an action and recovered a judgment for wages due to May 12, which judgment was satisfied. Subsequently the plaintiff brought an action for the wages accruing from May 12 to the end of the six months. *Held*, that since the contract was indivisible, there was an irrebutable presumption that the plaintiff had recovered in the first action all that he was entitled to under the contract.

CORPORATIONS.

Of late years the courts have greatly relaxed the rule which held it *ultra vires* of a private corporation to become the accommodation endorser of negotiable paper. In *Murphy v. Improvement Co.*, 97 Fed. (C. Ct., U. D. Ark.), 722, it was held that where the assent of all the stockholders is obtained, such an accommodation endorsement is valid even in the absence of a charter power to that effect, provided the rights of creditors are not impaired thereby.

The name of Mr. George H. Earle, Jr., Receiver of the Chestnut Street National Bank of Philadelphia, has been associated with a number of interesting cases on the liability of stockholders in insolvent corporations. The latest of these is *Earle v. Coyle*, 97 Fed. 410, where it appeared that in 1894 Coyle, a stock-

CORPORATIONS (Continued).

holder in the bank, sold his stock at auction to William Steele, the cashier of the bank; that the auctioneer delivered the certificate to Steele; that no transfer was made on the books to Steele, but the bank paid the dividends to Steele until 1897, when it failed. In an action by the receiver against Coyle to hold him liable on his stock, the plaintiff insisted that there had been no valid transfer from Coyle, by reason of a by-law of the bank providing that "no officer of the bank, except the president and vice-president, shall, without the permission of the directors, hold stock in the bank," so that the transfer to Steele, the cashier, was void. The Circuit Court of Appeals (Third Circuit) decided that the defendant and the auctioneer had performed their duty as "careful, prudent business men," that they had the right to assume that the directors had specially empowered Steele to hold the stock, and this inference was further justified by the fact that the dividends had been paid to Steele for three years. Judgment for the defendant was therefore affirmed.

COURTS.

A state court has jurisdiction to enforce the common law liability of a United States officer for acts growing out of his obedience to writs of the Federal Court. Thus, in *Park v. Hayden*, 61 N. Y. Suppl. 265, the marshal had seized a tug of plaintiff by virtue of a writ of execution issuing out of the District Court of the United States. In an action against the marshal, in the state court of New York, for negligently allowing the tug to deteriorate in value while in his possession, the Supreme Court of New York assumed jurisdiction and allowed a recovery.

CRIMINAL LAW.

In *State v. Anderson*, 59 Pac. 180, on the trial of an indictment for rape, the prosecution offered no testimony except that of the prosecutrix, a child of thirteen years. The trial judge charged the jury as follows: "You are hereby instructed that you should not convict the defendant on the uncorroborated testimony of the prosecutrix alone, but such corroboration may be by facts and circumstances connected with or surrounding the case; in other words, corroboration is not the testimony of other witnesses." On appeal from a conviction, the Supreme Court of Idaho decided that the above charge was improper, since the only corroboration which could properly be considered was corroboration obtained without the evidence of the prosecutrix.

Jurisdiction
in Suit
Against
United States
Marshal

Rape,
Conviction on
Testimony of
Prosecutrix

CRIMINAL LAW (Continued).

As the court remarked, "It (the charge) was virtually saying to the jury that the prosecution might be corroborated by her own statements." It was then contended, on behalf of the state, that the question had been properly submitted to the jury, even upon the uncorroborated testimony of the prosecutrix, citing *Tway v. State*, 50 Pac. (Wy.) 188; *People v. Wessel*, 98 Cal. 352. However, the court held that the above quoted rule applies only where the testimony of the prosecutrix is unimpeached; and in this case, since it had been shown that the prosecutrix was of loose character and uncertain reputation, the question should not have been submitted to the jury at all, but binding instructions given in favor of the defendant. The discharge of the latter was therefore ordered.

DAMAGES.

Considerable comment was caused by a late New Jersey decision to the effect that a parent could not recover anything for the death of his one-year old infant, on the ground that the latter would probably cost the parent more than it would gain for him. Following in the line of this case, the Supreme Court of New Jersey has decided that a verdict for \$5,000 for the loss of a four-year old child should be set aside as excessive: *Graham v. Cons. Traction Co.*, 44 Atl. 965. A peculiar feature of this case was that there had been two trials previous to the one from which the appeal was taken, at each of which a verdict for \$5,000 had been rendered.

EQUITY.

There is great diversity among the cases upon the question whether or not the answer by a corporation to a bill in equity is as conclusive as the answer of a natural person, and requires the complainant to produce more than the testimony of one witness. Some authorities hold that where the corporation's answer is verified by an officer, with full knowledge of the facts, it is conclusive, but all agree in holding that, unless it is so verified, it amounts to nothing more than mere pleading. Such was the case in *Savings Soc. v. Davidson*, 97 Fed. (Circ. Ct. of App. 9th Circ.) 696, where the answer of a bank was verified by the cashier, who showed by his testimony that he was not personally acquainted with the facts.

HUSBAND AND WIFE.

Johns v. Johns, 60 N. Y. Suppl. 865, shows that courts sometimes have as much trouble in construing their own judgments as they have in cases of instruments written by laymen. In this case a wife had obtained a divorce from her husband, the decree commanding the yearly payment of alimony, and also the payment by the respondent of the premiums upon policies of life insurance taken out by him upon his own life in favor of his wife. Subsequently the respondent died and the widow sued his estate for alimony accruing after his death, claiming that the estate was liable for alimony throughout her life. The Supreme Court of New York decided, partly in view of the provision for life insurance, that the effect of the judgment for alimony was to create a liability only during the lives of both parties, and that no intention appeared to continue the binding force of the judgment after the respondent's death.

Judgment for
Alimony,
Death of
Respondent

INSURANCE.

In *North. Pac. Exp. Co. v. Traders' Ins. Co.*, 55 N. E. 702, the defendant insurance company insured the plaintiff express company "on express matter . . . only while contained in cars while in transit upon lines owned, leased or operated by the Northern Pacific Railroad Company." The goods were destroyed while on a line operated by the Northern Pacific Railroad Company at the date of the policy, but not at the date of the fire. The Supreme Court of Illinois decided that the policy had reference to the operation of the line at the time of the execution of the policy only, therefore the subsequent abandonment by the railroad previous to the fire did not render the policy inoperative.

Construction
of Policy to
Express
Company

LIMITATION OF ACTIONS.

In *Beeler v. Clarke*, 44 Atl. 1038, the defendant, who was the maker of a note, on being pressed for payment, replied: "I cannot do it now; I have two members of my family to support." The Court of Appeals of Maryland decided that these words constituted both an acknowledgment of the existence of the debt and an implied promise to pay, thus tolling the statute of limitations.

Implied
Promise
to Pay

The surety of a note wrote to the payee, requesting him to collect the money as soon as possible, and stating that, "I will no longer be held good on the note, if you let him [the debtor] have the money any longer." *Held*, that this was a sufficient acknowledgment

Debt,
Acknowledg-
ment

LIMITATION OF ACTIONS (Continued.)

of the debt to bring it within the exception to the Nebraska statute of limitations, which required merely an acknowledgment of the liability: *Harms v. Freytag*, 80 N. W. [Neb.] 1039.

MORTGAGES.

The North Dakota Code (§ 4738) provides that mortgagors' signatures to chattel mortgages must be attested by two witnesses. Under this section the Supreme Court of North Dakota decided that the mortgagee was incompetent to act as one of the witnesses, and a mortgage attested only by him and a third party was void: *Donovan v. Elevator Co.*, 80 N. W. 772. In South Dakota and several other states the contrary view has been taken, on the ground that the modern rule rendering parties competent to testify in court has removed the basis for the objection to their acting as attesting witnesses: *Fisher v. Porter*, 77 N. W. (S. D.) 112.

NEGLIGENCE.

The Supreme Court of New Jersey has sensibly applied the rule of *res ipsa loquitur* to the fall of a brick wall, while in course of construction by the defendant, whereby the plaintiff was injured. "The wall was of brick, and it is a matter of common knowledge that when such cubes are laid upon one another, with care to keep the wall plumb, it will stand by virtue of the law of gravity; and a fall of a wall of brick would indicate either that it had been improperly laid, or that the fall had been caused by some force from without": *Dettmering v. English*, 44 Atl. 855.

Where, after a fire, the walls of the building, which had been left standing, were ordered torn down by the building inspectors, and the owner employed a contractor to perform the work, it was held by the Supreme Court of Ohio that the duty of removing the walls was one owing to the public and one which could not be delegated to an independent contractor, so as to relieve the owner from liability for the negligence of the workmen incident to the performance of the work: *Covington v. Cincinnati Bridge Co.*, 55 N. E. 618.

PLEADING AND PRACTICE.

In *Glendal Fruit Co. v. Hirst*, 59 Pac. (Ariz.) 103, it was held that where an action was commenced by attachment and the

PLEADING AND PRACTICE (Continued).

Judgment in Excess of Attachment defendant was personally served, the defendant could not object to the entry of judgment against him in an amount greater than that set out in the writ of attachment; but of course the decision would be different if there had been no personal service, as in cases of foreign attachment, or if the rights of third persons had intervened.

PRINCIPAL AND AGENT.

It is well settled that where payment of a promissory note is made to a person not in possession of the note, the burden is on the debtor to show that the payment is made to an authorized agent of the creditor. In *Rhodes v. Belchee*, 59 Pac. 117, it appeared that A. appointed B. his agent to sell goods and to receive in payment promissory notes. B. sold goods of A. to C., receiving C.'s note; and after B. had parted with the note, C. made payment to him. In an action by A. against C., the Supreme Court of Oregon held that the above facts did not justify C. in presuming that B. had authority to receive payment after he had parted with the possession of the note.

REAL PROPERTY.

Campbell v. Sidwell, 55 N. E. 609, presents one of those sets of facts involving conflicting liens which a professor of real property law delights in laying before his class as a puzzle. The case arose from the distribution of the proceeds of a sheriff's sale of land, against which there were, successively, (1) a vendor's lien, (2) a judgment, and (3) a mortgage. The vendor's lien was superior to the judgment, but inferior to the mortgage, while the judgment was, of course, superior to the mortgage. Under circumstances such as these an astute lawyer could present a very plausible argument on behalf of the priority of any one of the three liens, and indeed any result would probably find support in some decision, although the case has not arisen a large number of times. The Supreme Court of Ohio solved the problem on the theory that the vendor's lien, being in the nature of a secret, unrecorded trust, was the weakest of the three liens and least entitled to consideration. They therefore held that the superiority of the vendor's lien over the judgment was of less weight than the superiority of the mortgage over the vendor's lien, and, since the judgment was admittedly superior to the mortgage, they awarded the fund to the judgment creditor, balance to the mortgagee.

SALES.

In *Bank v. Anderson*, 44 Atl. 1066, the defendant held a note of A., with certain stock as collateral. Learning that the stock was worthless, since its issue was unauthorized, the defendant refused to renew the note, and A. arranged with the plaintiff bank for its discount. The defendant sent the note and stock to the bank, which paid the defendant the value of his interest in the stock and the balance was paid to A. No mention was made by the defendant of the worthlessness of the stock. In an action by the bank against the defendant, the Supreme Court of Pennsylvania held that, since there was no sale to the bank, the concealment by the defendant, did not amount to a fraud, Fell, J., saying: "There is no foundation whatever for the contention that the transaction was a sale by the defendants of their claim on the note and collateral. It was not, either in form or in substance, a sale, and none of the parties so regarded it at the time. It was merely the borrowing of one party to pay an overdue note held by another, and nothing more can be made of it." While the decision may be correct, yet, if the transaction did not amount to a sale of the defendant's interest in the stock to the bank, it certainly came very near to it.

WILLS.

Hoysradt v. Tionesta Gas Co., 45 Atl. 62, shows the distinction between a sale by virtue of an order of court and a sale where the court merely designates the vendor. A will had been probated in New York, and a copy filed in the county of Pennsylvania where land of the testator was situate, according to the act of March 15, 1832 (P. L. 135). Under the will the executor had power to convey the land. The executor died, and the New York court appointed a successor, by whom a conveyance was made, the validity of which was the subject of the present controversy.

It was strongly urged against the conveyance that the executor could derive no power to convey land in Pennsylvania by virtue of his New York appointment, but the Supreme Court of Pennsylvania decided that the executor derived his power from the will and not from his appointment, which latter was merely a designation of the person entitled to act under the will, and which was made by the only court having power to make such designation.

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IN MEMORIAM.

JAMES PARSONS.

James Parsons died on March 21, 1900, after a short illness. He was for many years Professor of Commercial Law, Contracts and Decedents' Estates in the Law Department of the University. Upon his retirement from the active duties of his chair he had been elected by the Trustees emeritus professor.

Of Professor Parsons it may be said with truth that he was a student from whom the common law kept no secrets. As a

lecturer he was difficult to follow. As a writer he was obscure. A certain eccentricity of style discouraged readers and prevented the importance of his researches from being generally recognized. To those, however, who were willing to expend the effort necessary to an understanding of his writings, and to those who had the rare good fortune to meet him in the intimacy of the study, he revealed himself as a lawyer of profound scholarship and of powerful mental grasp. There never was a lawyer who was more thoroughly dissatisfied than he with conventional explanations of legal phenomena and with glib but superficial statements of legal doctrine. He never investigated any portion of the field of law without in the end removing much of the rubbish with which it had been overlaid—clearing the ground for the work of those who, coming after him, should be endowed with the capacity to popularize his discoveries. To his work of research he brought a mind well trained by patient and persistent study. His knowledge of languages, ancient and modern, was truly remarkable. He was a student of the civil law and an attentive reader of the writings of all the continental jurists. There was nothing narrow or provincial in his treatment of legal problems. He was not afraid, in their solution, to summon to his aid the best that foreign scholarship had to offer.

His favorite field of investigation was the law of partnership. He published his work on that subject in 1889. A second edition appeared ten years later. No one who will take the time and trouble thoroughly to understand this remarkable book will hesitate to pronounce it an invaluable contribution to the literature of the common law. Here at least is a book which recognizes that the law of partnership must have as the basis of its development some single scientific conception susceptible of application in the solution of all problems. The author refuses to be satisfied with the current analyses of the partnership relation—no one of which is found adequate to explain that relation in all its bearings. He discards the entity theory of the firm's existence as fundamentally unsound. He points out the insufficiency of any theory which seeks to resolve the relation into a mere contract or a bundle of contracts. He builds up his system upon the foundation of a common property of which the partners are the co-owners. He emphasizes the distinction between mere co-ownership, where the *holding* of property is the object in view, and the embarkation of the common property in a business of which the partners are the co-proprietors. Co-proprietorship thus becomes the test of partnership and a rational basis is afforded the student for determining, in a given case, whether a partnership exists, what are the rights and liabilities of the asso-

ciates during the continuance of the relation, and what rules should be invoked to settle the account between them upon dissolution. The prediction is hazarded that within fifty years from the time of his death the law of association in all its branches will be recognized as being in fact but the application of the principles which Professor Parsons was the first clearly to apprehend.

Of the man himself nothing need be said in public print, except to record the fact that successive classes of students found in him an instructor who was always ready to spend himself in the personal service of those who came to him for advice and help; that his brethren at the Bar recognized him as the embodiment of high principle and professional courtesy; and that his colleagues in the faculty of the Law School share with his many friends that sense of personal loss which comes only when death claims those who have faithfully served their generation.

G. W. P.

THE EFFECT OF DIVORCE AND REMARRIAGE ON DOWER RIGHTS.—In the appeals of *Brown* and *McDonald*, argued as one and decided on identical grounds, the Supreme Court of Errors of Connecticut has recently passed upon an interesting question under Connecticut statutes. The opinion (which will be found in 44 Atl. Rep., 23-25), leaves much to be desired. It suggests, however (more by omission than inclusion), a number of questions concerning dower as affected by divorce and remarriage, a brief examination of which may be of interest.

Considering the two cases as one, the extraordinary state of facts presented was as follows: The husband, A., was divorced from his wife, B., the latter being the innocent party. A. subsequently married C., from whom he was also divorced, C. being the innocent party. A. then married D., who survived him as his lawful wife. Both B. and C. claimed dower in his land, under a Connecticut general statute (1877.), which provides: "Every woman married prior to April twentieth, eighteen hundred and seventy-seven, and living with her husband at the time of his death, or absent by his consent or by his default, or by accident, or who has been divorced without alimony, where she is the innocent party, shall have right of dower, during her life, in one-third part of the real estate of which her husband died possessed in his own right, unless a suitable provision for her support was made before the marriage by way of jointure," etc.

A. was married to his first wife, B., in 1858, and divorced from her in 1863. In 1864 B. married another man, with whom she was living at the time of A.'s death and by whom she had six children. In 1864 A. also remarried, taking C. to wife, and in 1866 was divorced from her. In 1882 C. remarried. In 1867 A. married D., who survived him. Prior to his marriage with D., A. had not

been the owner of any property of value. All of his real estate was acquired after March, 1875, and the greater part of it after March, 1882.

The decision of the court, stripped of its verbiage, is briefly as follows: The Act providing for dower should be read in connection with the act of 1849, permitting both parties to a divorce to marry again. As the latter statute permits both parties to a divorce to remarry, it qualifies the former by making the right of the innocent wife to dower dependent on the husbands not remarrying and leaving a lawful wife surviving.

Going even further, the court strongly intimates that even where the husband has remarried, but his second wife has predeceased him, the surviving divorced wife should be held barred of all dower interest under the statute, by reason of the fact that, by remarriage of the husband, the link which attaches the divorced wife to the ex-husband and supports her claim of dower, is finally severed.

This is contrary to *Stilson v. Stilson*, 46 Conn., 15, (1878.) in which it was held that the second wife not surviving, the innocent divorced wife was entitled to dower; but it is a *tour de force* which will prevent "troublesome questions" from arising.

The real gist of the opinion is as follows: "The person entitled to dower is the wife living with the deceased at the time of his death, unless her separation at that time is due to his fault, or accident, or a divorce that leaves her free and the man so far her husband that he has no other conjugal ties. It is certain that a woman divorced is admitted to dower only because she represents, and no other is, the wife living with her husband, or separate through his fault. . . . When a woman lives with her husband at the time of his death, she possesses the right (to dower), and the same right can then belong to no other. When the act of 1849 expressly authorized the remarriage of a man divorced for his fault, it did not enact a different law for such marriages. It gave to the wife the full rights of a wife, and among them the right to share the husband's estate by way of dower as well as of distribution in the same manner as every other wife. The present statute enables a woman divorced for her husband's fault to be treated as so far his wife that she may share his estate by way of dower, so long as she represents the wife living with him or separated by his fault; but the act of 1849 modifies the practical effect of this by enabling the divorced husband to lawfully take a wife, who, living with him at the time of his death, is by the express terms of the statute the one entitled to dower. The words 'or who has been divorced where she is the innocent party,' still mean the wife separated by his fault from a man who has no other conjugal tie. If, however, he acquires such tie, and leaves a lawful wife surviving, she is the 'married woman living with her husband at his death,' and the contingency of separation provided for by the qualifying words does not exist."

With due respect to the learned court, it must be said that the case under discussion presents an almost perfect example of *judicial legislation*, for it forcibly demonstrates how the supposed exigencies of an appeal may result in an interpretation of statutes in a manner

that does violence to legislative intent. The court expressly concedes that after divorce the innocent wife has the right of dower; that the statute relied on was first enacted in 1872 substantially as it now is, and asserts that it was so enacted "mainly" to meet the emergency of a case where the husband by will diverts his whole property, that "there may be suitable provision made for the maintenance and comfortable support of widows after the decease of their husbands." Undoubtedly this was one of the objects the law-making power had in mind in passing the act, though the act does not say so. But the act does say, and that expressly, that one of its objects is to provide that a divorced wife, who is the innocent party, shall have right of dower in the estate of him that was her husband. It is evident that it was intended to make the guilty husband, either through alimony, or, where that was not granted, then through dower in his estate, contribute toward the injured wife's support. Justice and the public welfare required that he should. The wife during marriage was dependent upon him for support, and the obligation to support her whom he had taken to wife remained when, by his fault, they were divorced. This the law in question recognizes. She, notwithstanding the divorce, was still to some extent dependent upon him for support, in the present or future or both. Though divorced from him, the tie that bound him to her was not wholly severed. She remained interested in his property, through the alimony he paid out of it, or the expectation of an interest in it at his death.

In view of the above, it is both unreasonable and inequitable to hold that the guilty husband is in a position to cut off, at pleasure, the innocent divorced wife's claim upon his estate. He cannot by the solemn execution of the instrument whereby he disposes of his property to take effect after his death, deprive a woman entitled to dower in his estate of that right; but he may, statute or no statute, by the simple, natural and pleasurable act of remarriage, shut out her to whom he is still bound both in law and in morals. Such is the sum and substance of the decision before us. It holds that the right of the innocent divorced wife to receive dower in her guilty husband's estate, is terminable at will *by the husband*, and that his remarriage cuts the last thread by which he is bound to her whom he has grossly maltreated. It records against the legislature the enactment of a law purporting to protect and provide for the victim, enforceable only at the option of the guilty party. Or was it intended as an inducement to remarriage by reduction of the "inextricable intertwinement" of property rights that might otherwise result, and as a premium on injustice? Surely this would be a serious reflection on the moral responsibility of even our modern Solons, and naturally recalls Cicero's comment: "*Nihil tam absurdum quod non dictum sit ab aliquo philosophorum.*"

But it is to be observed that the act permitting divorced parties to marry again was passed in 1849, while the old law of 1672, giving dower to innocent divorced wives, was reenacted in 1877. Why should the former control the latter? If there is any inconsistency, the law of 1849 must give way. However, the law of 1877 in no

way conflicts with the remarriage permitted by the statute of 1849. It is only when we read into the latter the rights that spring from marriage at common law, and construe it as *securing those rights from molestation at the hands of future legislatures*, that a clash results.

There has been said to be a "Golden Rule" by which judges should be guided in the construction of statutes; that they ought "to look at the precise words of the statute and construe them in their ordinary sense only, if such construction would not lead to any absurdity or manifest injustice; but if it would, then they ought so to vary and modify the words used as to avoid that which it certainly could not have been the intention of the Legislature should be done." (Per Jervis, C. J., in *Abley v. Dale*, 11 C. B. 390, E. C. L. R. 73, (1851.); in *Castrique v. Page*, 13 C. B. 463, E. C. L. R. 76, (1853.); and in *Mattison v. Hart*, 14 C. B. 385, E. C. L. R. 78, (1854.)) "But," remarked the formulator of the rule, "if the precise words used are plain and unambiguous in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning." Jervis, 11 C. B. 391, (1851.); per Pollock, C. B. 9 Exch. 465, (1854.).

The construction put upon the act of 1877 is based on the assumption that, "where a woman lives with her husband at his death she possesses the right (to dower), and the same right can then belong to no other." Inasmuch as the language of the statute makes no exception in favor of a second wife, and its avowed object is defeated if such exception is made against the innocent first wife, the observation loses all force if put forward as something that was in the legislative mind at the time of the enactment of the section. If it is a common law principle thus stated, and not deducible from the language employed by the law makers, the reply is that the common law as to dower was never the law of Connecticut, and that, in any case, the Legislature may modify or repeal that law at pleasure. But is there any manifest injustice or absurdity in allowing several women, a widow and innocent divorced wives, dower in the same property, and would such a proceeding contravene any rule of law or equity?

In the first place, when a woman marries she does so (in legal estimation, at least) with her eyes open, and cannot plead ignorance if an innocent divorcee and a statute combine to postpone, curtail or defeat her supposed rights in her husband's property. She is bound to know both the law and the fact (*e. g.*, in strict law she is guilty of adultery, if she innocently marries a married man, in states where the marriage of either party makes sexual intercourse adultery). If, without investigation, she enters into the contract she does so at her risk. The rights of the divorced wife under the statute have been previously acquired, and whether such rights are

vested or contingent they are superior to those of the second wife, and can no more be displaced or superceded than can the lien of a prior mortgage be postponed to that of a subsequent encumbrancer. It is difficult, therefore, to see just where the injustice to the widow, in allowing dower to the innocent divorced wife, comes in.

But, further, why is there any insuperable obstacle to holding that property may be charged with distinct dower rights in favor of several persons? The heirs-at-law or devisees are entitled to the decedent's realty, but subject to liens and encumbrances, to dower interests and to all rights attaching prior to the death of the owner. A dower right is something in the nature of an encumbrance, created by marriage as a result of positive law. It is so, at least, in the United States. The right is ended at common law by divorce *a vinculo*, but the common law right of dower no longer exists in this country, the rights of the surviving wife in the real estate of her husband being created by statute alone. In the main, the estate conferred upon the widow conforms to that of the common law, but in the very opinion before us the court admits that "our land law (Connecticut) was, from the beginning, different from that of England. . . . The tenancy by dower was unknown to our early law. The widow's interest in the land, as well as the personal property of her husband, was through distribution. As our law gave her one-third of all her husband's estate, subject to the discretion of the court in distribution, there was no dower except to meet a case where a husband by will should divert his whole property."

Why, then, should the court construe a statute, plain on its face, so as really to apply the old doctrines of coverture? Because a woman is found in circumstances unknown to the common law is no reason for creating rights by construction. But here she is found in circumstances *expressly provided for* by the law-making power, unless it is to be supposed that upon a subject in which the common law had never been followed a further departure was intended as conformance. Surely it is competent for the Legislature to create an estate, vested or contingent, in the wife, divorced wife or widow, as it sees fit. It is not bound by old notions of coverture and can protect and provide for helpless woman whenever and wherever her relations to a man who is or has been her husband warrant. As a free agent, untrammelled by inapplicable common law views and methods, it may enact such laws affecting dower as it deems expedient; it may prescribe any measure, either as to quantity or quality, and may determine the relationship and status of the parties necessary to bring the statute into operation. It alone is the judge of the wisdom and policy of its enactments, and no court has the right to overrule that judgment unless the Legislature has clearly exceeded its functions: *Adler v. Whitbeck*, 44 Ohio St. 539, (1886.) "It has never been doubted that this entire body and system of law, regulating in general the relative rights and duties of persons within the territorial jurisdiction of the State, without regard to their pursuits, is subject to change at the will of the Legislature of each State, except as that will may be restrained by the Constitution of the United States": *Smith v. Alabama*, 124 U. S. 475, (1887.).

Upon the death of the husband, the widow and innocent divorced wives should be entitled to have their shares assigned, or dower admeasured and set off, in order of seniority. If the divorced wives have faithfully performed their marital duties, why, as a matter of equity, are their rights inferior to those of the wife living with her husband at the time of his death (the wife of a month, perhaps), the heir-at-law or the object of his testamentary bounty?

If the widow and divorced wives are not entitled to admeasurement in order of their marriage immediately upon the husband's death, that is, if all cannot enjoy the right immediately, then the decision in the case of *Stahl v. Stahl*, 114 Ill. 375, (1885.), points the way to a proper disposition. It was there held that a wife, who had obtained a divorce from her husband for extreme and repeated cruelty, was entitled to dower in all her divorced husband's lands for her lifetime, the second wife being "entitled to dower in the whole of the premises, subject to the encumbrance of the first wife's prior right of dower, during the continuance of that right."

The idea of several dower rights in the same land is as easily entertained in legal theory as that of the existence of superposed liens. The right of the first wife under the statute is that of a senior encumbrancer, and the rights successively acquired by innocent divorced wives *ad infinitum* are superior to those of the widow, the "junior encumbrancer."

The writer believes the decision of the court in these appeals was proper, but that it should have been put upon another ground. Is not the real reason why B. and C. should not have dower in the lands of A. not that A. left a wife surviving, but that B. and C. had themselves remarried? If that is firm ground, then it could make no difference whether or not D. died before B. and C. This line of reasoning will, of course, prevent "troublesome questions" from arising only where the innocent divorced wives have remarried; but it is sufficient for the determination of the present case and certainly seems more consonant with justice and fairer to the Legislature.

When B. and C. remarried, they voluntarily relinquished all claim to an interest in A.'s estate. Such would appear an equitable construction to put upon their acts, and should satisfy such a statute as that of 1877, unless, indeed (which is contrary to the plain intimation), the statute was intended simply as punishment of the erring husband. Of course, under the Connecticut law, which gives the wife no dower interest during coverture, but only a distributive share, or its equivalent, upon the death of the husband, B. and C. upon remarriage acquire no inchoate right in the realty of their second husbands; but then, they had had no such right in the realty of their first. If the second husbands should die, B. and C. would at once acquire vested interests in the property of which the second husbands died seized, and would be entitled to have their dower set off and assigned. They thus put themselves in exactly the same position with relation to their second husbands that existed between them and their first husbands.

Both the first and second husbands dying at the same time, would B. and C. be entitled to dower in the estate of both? It would seem

that this is a position more repugnant to principle than that of a widow and one or more divorced wives claiming dower in the same lands under different statutes. Under the common law a widow could not have dower both out of lands given in exchange and those taken in exchange. And, to-day, she may take under the will or under the statute. The law does not allow her a double portion, and if she claims in one way her claim in the other is inconsistent. She must make her election. An election not to take under the Connecticut statute, a waiver and voluntary relinquishment of rights thereunder, should be conclusively presumed in case of remarriage. It amounts to a choice of chances, which she is free to make. Nor should this election be allowed to be made after the death of either the divorced husband, or the second husband, or both, for upon remarriage her condition is completely altered and the status that is contemplated by the statute as existing is lost.

It was the fact that the relation between the first husband and B. and C. after their divorces, no longer existed, and that by the termination of this relation, the wives were cast upon a cold world, that undoubtedly led the Legislature to adopt the paternal statute of 1877. That act takes the injured wife by the hand, and says: "You have been wronged and deprived of the support on which you relied, not through any fault of your own, but by reason of your husband's evil ways. You are no longer his wife, and under the common law are not entitled to dower after his death, but after that event you shall have dower in his estate as a reward for your fidelity, a provision toward your support and a punishment to him." The wife is left in an unprotected condition. When she remarries she is no longer in the position contemplated by the Legislature, and, in justice, after the assumption of this new tie, she is no more entitled to dower than is the pensioned widow entitled to assistance after remarriage. Express provision bars in the latter case, and reasonable interpretation in the former. In both, the one bound is freed by the act of the beneficiary.

Such remarriage is not taken into account, as an exception, in the Act of 1877; if in mind, there is nothing to indicate it. But a thing within the letter is not within the statute if contrary to its intention: *People v. Utica Ins. Co.*, 15 Johns* 381, (1818.); approved in *Ins. Co. v. Gridley*, 100 U. S. 615, (1879.).

It seems reasonable, too, to hold that while under such a statute the husband cannot by remarriage deprive his innocent divorced wife of her quality as such, that she, by remarriage, may destroy her right and absolutely sever the last link between them. In the case of *Rice v. Lumley*, 10 Ohio St. 596, (1857.), it was held that a woman who has obtained a divorce *a vinculo* for the fault of her husband, and afterward married another man, is not after the death of the person who was her first husband entitled to dower in his estate. "In such case," it was said, "the dower is not lost by way of forfeiture, but a woman divorced *a vinculo matrimonii* from her first husband, and by subsequent marriage the wife of another man at the time of the death of the person who had been her first husband, is not the *widow* of the latter within the terms of the statute relating to dower." The

Connecticut statute in question clearly contemplates the existence of the divorced wife *as a divorced wife*, if she is to benefit by its provisions. But after remarriage is she the divorced wife of her first husband? In common parlance (as it should be in legal estimation) she is not, she is *another man's wife*.

It seems to the writer that there can be little question of the divorced wife's capacity to waive the benefits of the statute, to relinquish her rights under it and bar her claim. It is true generally that during coverture the wife's inchoate right of dower is incapable of being transferred or released except to one who has already had, or by the same instrument acquires, an independent interest in the land; that the right cannot be leased or mortgaged, nor can a married woman bind herself personally by a covenant or contract affecting her right of dower during the marriage. But in Connecticut, it seems, no such thing as inchoate right of dower exists. Only upon the death of the husband does the right attach, and it is then a vested right, whether the claimant be the widow or innocent divorced wife. The remarriage of the divorced wife, if considered as a waiver or relinquishment of rights under the statute, affects no interest existing at the time, its operation being by *quasi* estoppel (for want of a better term) when, after the husband's or ex-husband's death, the claim is made. When the innocent divorced woman acquires the contingent estate she is certainly a *femme sole* and under no disability. The general incapacities, spoken of in the preceding paragraph, arise from coverture and the principle applies to the wife's inchoate interest. There would be no reason, therefore, in holding her incapable of barring her contingent right by remarriage. She is free to act and, having acted, the reason of the law as applied to her has ceased. She has put herself outside the spirit of its provisions.

In conclusion, the writer is conscious that the ideas advanced above partake largely of the nature of personal opinion, but there does seem to be a foundation in justice and equity for principles such as have been suggested, and for an application of the law in accordance therewith. It certainly appears a violent construction to hold that a statutory obligation, imposed without qualification, was intended to or should operate only where the person absolutely bound, so far as language can go, sees fit; that he may submit or ignore *ad libitum*, leaving the person for whose benefit the statute was passed deprived of a valuable right and without redress. Such escape can only be through the loophole of a spurious intent, foisted upon the law, or a denial of the sovereign power of the Legislature to create rights and impose duties in its discretion. On the other hand, it is an elementary proposition that he who has a right may waive it or preclude himself from asserting it. In few cases is compulsory acceptance of benefits conferred by statute intended. Public policy may sometimes demand that a right bestowed shall not be sacrificed, but it equally demands that privileges granted shall not be abused and perverted.

MUNICIPAL CORPORATIONS ; POWER OVER PUBLIC HIGHWAYS ; HACK-STANDS ; CONTRACTS BY RAILROADS FOR THE PRIVATE USE OF STATION GROUNDS. *Pennsylvania Co. et al., v. City of Chicago et al.*, Supreme Court of Illinois, October 16, 1899, 54 N. E. 825.

The Pennsylvania Company controls one of the largest and busiest stations in the City of Chicago. By an ordinance of December 31, 1885, the City established a hack-stand which was thereby permitted to occupy the street for a distance of three hundred feet in front of this station. Thus the waiting carriages stand directly in the way of passengers going to and from the depot. It is not disputed that some twenty hacks and express wagons occupy this stand for the entire business day, and that some twenty-five horses are fed there daily. On February 24, 1896, the Pennsylvania Company filed a bill for an injunction restraining the City from continuing the hack-stand, alleging that it prevented access to their station, thus interfering with their private rights, and placing an unjust burden upon their property. It appeared that the Company had leased certain parts of the station grounds to the Eighth Carriage Company, granting to it the right to solicit patronage in the station. The injunction was denied in an opinion by Phillips, J., on the ground that the municipality might permit a private hack-stand to be established upon its streets in front of public buildings, and that this applied to buildings occupied by quasi-public corporations. Cartwright, C. J., dissented on the ground that the legitimate uses of a public street could not be altered by the public character of the buildings thereon. He says: "It seems to me absurd that because property is owned by the State for a State house, . . . or by a school district for a school-house, the city may obstruct the street in front of it and turn it into a market place or a stable yard." But the authorities he cites relate to carriage stands in front of private houses. He further held that complainants had no adequate remedy at law, because their actions would lie not against the city, but against the individual and irresponsible hackmen.

The vital point of difference then between the majority opinion (excluding dicta) and the opinion of Cartwright, C. J., is as to the rights of a city to establish a hack-stand in front of a public building on the ground that the public nature of the edifice renders the street in front peculiarly susceptible to public control.

The cases as to this exact point are very few, but a brief examination of some of the decisions where the facts are similar to those in the principal case will suggest some points of interest. It seems to be generally admitted that the grant of a street for a hack-stand is a mere private use. *Branahan v. Hotel Co.*, 39 Ohio St. 333 (1883); *McCaffrey v. Smith et al.*, 41 Hun. 117 (1886.). The rule is laid down in "Elliott on Roads and Streets" (p. 331) as follows: "But a city cannot authorize such stands where they will interfere with the access to the premises or otherwise deprive him (the abutting owner) of his rights as owner of the fee." If this rule be strictly followed the City of Chicago had no right to authorize a cab-stand in front of a station where it would necessarily interfere with the daily traffic. In the leading case of *Rez v. Cross*, 3 Camp.

224 (1812.), Lord Ellenborough held it unlawful for the public stages to stop in front of Charing Cross for three quarters of an hour while waiting for passengers between trips. In *Montgomery v. Parker*, 114 Ala. 118, 21 So. 452 (1896.), it was decided that the proprietor of a hotel has no more right than any other person to block an adjacent street with a hack-stand. The only Pennsylvania case in point in the present discussion is *City of Lancaster v. Reiser*, 14 Lancaster Law Review, 193 (1897.), where it was held that a city had no power to sell any part of its streets, even in front of a railroad station, for use as a private cab-stand.

Except the above cases no authorities have been found on this question of the power of a municipality to authorize a cab-stand in front of a building against the wishes of the owner. From an examination of these cases and the few others which have reached the appellate courts we may conclude that the general rule is that a municipal corporation may make any reasonable regulations as to hacks and hack-stands it desires without regard to abutting owners. The following recent cases will serve to illustrate this rule: *Montgomery v. Parker*, 114 Ala. 118 (1896.); *Emporia v. Shaw*, 51 Pacific, 237, 6 Kan. App. 208 (1897.); *Lucas v. Herbert*, 148 Ind. 64, 47 N. E. 146 (1897.). From this rule the principal case of *Chicago v. the R. R. Co.* marks no departure in theory. The majority of the Court evidently considered the establishment of this hack-stand a reasonable regulation.

DEPRIVATION OF ATTORNEY'S LIEN.—*Burpee v. Townsend* (Dec., 1899), 61 N. Y. Supple. 467. The question raised in this case involved some points of law upon which the courts have not been unanimous. The questions are of frequent occurrence at the present day and of much importance. The action was brought by Edward B. Burpee against Gerard B. Townsend, and was settled later by the parties, nothing being paid in settlement. A motion was made by the attorney for the plaintiff for leave to prosecute the action in aid of his lien for costs, but it was denied. The Court said: "The parties had the right to settle the action and the attorney's lien was subject to such right. The law encourages such settlements and does not permit attorneys' liens to stand in the way of them. It is said, in some decisions, that where the parties collusively settle the action so as to defraud the attorney he will, on showing that fact and that the client is worthless, be permitted to prosecute the action to judgment, in order to establish his right against the opposite party under his lien. This is rather fanciful at best, but no such case is here presented."

The authorities on the question of attorney's lien are more or less confused and unsettled. "The lien of an attorney upon property of his client in his possession has been recognized from the earliest times and never questioned. It is the right of the attorney to retain possession of such property until his claim for compensation for professional services has been satisfied, and while some question has been made as to the correctness of the term 'lien,' as so applied,

the right to it has never been denied." (3 Amer. and Eng. Ency. of Law, 447.) The term "lien," as has just been intimated, is inaccurately used in respect to an attorney's claim for professional services. His claim bears some of the earmarks of a lien, but it is in reality only a claim or right to ask the intervention of the court in his behalf when, having obtained judgment for his client, he finds there is a probability of being deprived of his costs. The so-called attorney's lien differs from other liens in so far as there is no right of sale vested in the attorney; he merely has the right to hold the client's property until professional charges are paid, or to deduct the amount when money of the client is in his possession and pay over the balance to the owner.

There are two distinct kinds of attorney's lien, viz.: a lien on judgment and one on money, papers or other similar property of the client. The distinction between the two has given rise to the terms "charging lien" and "retaining lien." While there is nothing in the names, a failure to distinguish between the two classes has caused much of the apparent confusion in the authorities on this subject.

In the case under discussion it appears that the attorney had no property of the client in his hands, and he had not obtained judgment in the cause. He had, however, incurred costs and rendered professional services to the plaintiff, and his contention was that he had an inchoate lien on the judgment which he hoped to gain against the defendant in the case. He wished to prosecute the action to judgment notwithstanding the amicable settlement by the parties. The court properly decided against his claim.

The policy of our law is to avoid litigation as much as possible, and the fact that an attorney loses his costs should not be allowed to interfere nor stand in the way of public policy. Moreover, much injustice might be done if the courts allowed the attorney's contention. Suppose a plaintiff in an action decides, after action brought, that his claim is worthless and settles with the defendant, each agreeing to defray half the costs of court. Here the defendant would be obliged to pay the plaintiff's attorney if he wished to avoid a useless suit. Such a doctrine would undoubtedly lead to useless litigation: 65 Howard Pr. [N. Y.] 307, (1883.), 88 Kentucky 105, (1889.).

It has been held that a settlement between the parties to an action, even after judgment has been signed, will not be set aside, even though the effect of such settlement be to deprive the attorney of his costs, provided there be no fraud or collusion on the part of the litigants. 11 Jur. 455, (1847.).

Where there are cross actions and the plaintiff in each has obtained judgment, it has been held competent for the parties to make a *bona fide* settlement of the matter between themselves, although the consequence of such settlement may be that the attorney for one party will lose his lien for services. 2 El. and El. 17, (1865.), 10 M. & W. 18, (1855.).

In so far as this case decides that an attorney can have no such interest in a case as will enable him to prevent the parties from reaching an amicable settlement, in the absence of fraud or collusion, it is certainly in accord with the better authorities.

BOOK REVIEW.

JOURNAL OF THE FEDERAL CONVENTION OF 1787, ANALYZED,
etc. By HAMILTON P. RICHARDSON, Esq., of the Wisconsin Bar.
San Francisco: The Murdock Press. 1899.

The proceedings of that Convention which framed the wonderful instrument under which our law lives and has its being must always have a special interest, not only for the legal profession, but for all who are interested in this great civil government of ours. New problems have arisen, new territories have been acquired, but the Constitution has ever proved serviceable in solving the problems and governing our newly found colonies. Rightly interpreted, it will always be thus, for it was framed by men who seemed to have known their fellow men and the philosophy of history so truly that they acquired an insight into the future which may fairly be termed prophetic.

When we first took up this admirable little work we feared that it would add nothing to the literature on the subject. But our fears proved groundless, for it is a most complete and well-arranged summary of the Convention's work. All the plans, the rough and revised drafts, and, best of all, the interpretation are well set forth. New and original ideas are constantly to the fore, and we can conclude no better than by printing the conclusion of the author himself. The words in parenthesis are our own: "To a British statesman (Gladstone) has been attributed the saying that 'As the British Constitution is the most subtle organism which has proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man.' But it may be submitted (this idea is not strikingly original, but plainly presents a truth which must become clear to all of us upon a moment's reflection, but is not instantly patent,) that the American Constitution, instead of being struck off at a given time, was drawn from the British Constitution and from the first American Constitution (the Articles of Confederation) in substance and in form, and however the British Constitution may preserve the equilibrium of the governments of Great Britain, the Constitution of the United States of America was designed to preserve the great principle of self-government, general and local, joint and several, for the people of America."

J. M. D.

BOOKS RECEIVED.

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COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. Vol. VII.
By SEYMOUR THOMPSON, LL.D. San Francisco: Bancroft-Whitney
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PERRY. Fifth Edition. Edited by JOHN M. GOULD. Two Volumes.
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CARLOS C. ALDEN. New York: Baker, Voorhis & Co. 1899.

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RAILWAY CO-OPERATION. By CHARLES S. LANGSTROTH and WILSON
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JOURNAL OF THE FEDERAL CONVENTION OF 1787, ANALYZED. By
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D. DOS PASSOS.

*REPORT OF THE SIXTEENTH ANNUAL MEETING OF THE BAR ASSO-
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No. 5.

MAY AN ESTATE BE DEPRIVED OF ITS USUAL INCIDENTS AT THE WILL OF THE CREATOR?

It is proposed in this paper to examine the development of the legal doctrine by which the owner of an estate, whether large or small, may hold the property free from those incidents which usually attend the ownership of such estate. It will be useful to preface this investigation by a statement of the various kinds of freehold estates, with their incidents.

A. Estates in fee simple and absolute interests in personalty. The usual incidents of the ownership of such estate may be classified as follows: (1) The power to alienate; (2) the power to will; (3) devolution under the intestate laws, in case the owner does not dispose of the estate in his lifetime or by will; and (4) the liability for debts.

B. Estates in fee tail. The only incidents with which we are concerned are (1) power to commit waste, and (2) power to bar the entail by fines and common recoveries.

C. Estates for life. The important incidents are: (1) the power to alienate; (2) forfeiture for waste; and (3) liability for debts.

(Estates for years are not separately classified because,

so far as our purpose is concerned, they are governed by the same principles as estates for life.)

This table is not intended as an exhaustive classification of the incidents of estates. All that is intended to be expressed by it is that, in the absence of any restrictive clause in the instrument creating any one of these estates, it will have attached to it by law the incidents mentioned. The problem that then arises is: How far may the creator of an estate by express provision detach from the estate created all or any of the incidents mentioned?

The earliest statement of the law is found in Lit. § 360. "Also if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because, when a man is enfeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void." § 361: "But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, etc., or the like, which conditions do not take away all power of alienation from the feoffee, etc., then such condition is good." § 362: "Also, if lands be given in tail upon condition, that the tenant in tail nor his heirs shall not alien in fee, nor in tail, nor for term of another's life, but only for their own lives, etc., such condition is good. And the reason is, for that when he maketh such alienation and discontinuance of the entail, he doth contrary to the intent of the donor, for which the statute of W. 2, Cap. 1, was made, by which statute estates in tail are ordained." The effect of the doctrine of common recoveries upon the latter proposition is thus stated in Co. Litt. 223 b.: "But as to a common recovery the condition is void, because this is no discontinuance, but a bar, and this common recovery is not restrained by the said statute of W. 2. And therefore such condition is repugnant to the estate tail." And on the same page, Lord Cope expresses his opinion about similar restrictions upon the lesser estates: "As if a man make a lease for life or years upon condition that they shall not grant over the

estate or let the land to others, this is good, and yet the grant or lease should be lawful." It is noticeable in this earliest statement of the law that no distinction is taken between forfeiture upon alienation and restraints upon alienation; the illustrations are so concise that it is difficult to understand whether they are examples of forfeiture or simply of restraint; but in any event it is clear that Littleton's objection is the same to (1) an estate in fee to A., with the proviso that if he attempt to alienate, the estate shall vest in B., and to (2) an estate in fee to A., with a proviso that he shall have no power to alienate it.

It would have been the simplest way to deal with such conditions as are suggested above to say that they are void, because they are repugnant to the estate granted: that one cannot in one breath give A. an estate in fee simple and in the next say that he shall not have the ordinary powers of an owner in fee simple—that such a condition is repugnant to the estate granted, and therefore void. And Pearson, J., in *Re Rosher*, 26 Chan. Div. 801 (1884), goes so far as to say: "I confess I wish the law had been allowed to stand on the simple question of repugnancy, because then there would have been no uncertainty and no confusion." Certainly there would have been no uncertainty and no confusion, and the courts would have been saved the solution of many nice questions, but it does not follow that the law would have been more beneficial. In law, as in morals, the easiest course is by no means necessarily the best; if simplicity is the only argument in favor of the repugnancy rule, it were wiser to revise the present list of various kinds of estates, and add to it, for example, subdivisions of estates in fee simple, in one of which a man might hold without power to alienate it, in another without liability for his debts, etc.

In fact, the authorities, from Littleton to the present time, are agreed that the repugnancy theory, though the simplest, is not the true one; that an estate may be created without the owner having all the usual powers of the possessor of such an estate. Indeed, it might as well be argued that, because an owner in fee simple has the natural right to erect any building upon his land and use it as he chooses, provided

he complies with the police laws of the state and does not create a nuisance to his neighbor, it would be repugnant and illegal to insert in a deed creating an estate in fee simple a condition that the grantee should not erect a factory upon the premises granted; and yet, of course, it is well settled that such a condition is valid and binding, not only on the grantee, but on his assigns. It is not true that such a grant contradicts itself; the grantor does not first give a power and then take it away, but on the contrary he never intends to confer upon the grantee the power to erect a factory. And precisely the same argument applies where the condition is that the grantee shall not alienate; if the condition is to be held void, it must be upon some other ground than that the grantor has contradicted himself. Littleton's own illustration of a condition in partial restraint of alienation being good shows that the courts will recognize the power of a grantor to deprive the estate in the hands of his grantee of certain of its usual legal incidents. The question then arises, how far may this be done?

It is submitted that the only principle, if it may be called a principle, which governs such restrictions is public policy, which is nothing more than the effort of the courts to apply to the facts of a given case those principles of morality which, though not embodied in statutes, are nevertheless recognized as legally binding in the community. If it be objected that this implies the power of judges to make the law, whereas their province is to interpret it, it may be replied that this power is the distinguishing and crowning feature of our common law, as opposed to those systems of law which are embodied in codes whose existence implies the non-existence, or at least the abolition, of any principle not contained therein. In the field of contract law, a dozen illustrations might be given of agreements which though not forbidden by statute (at least originally) are yet forbidden or descimaged, in various degrees, by the courts; such are those in restraint of marriage, *Lowe v. Peers*, 4 Burr. 2225, by a mortgagor to waive his equity of redemption; *Newcomb v. Bonham*, 1 Vern. 7, agreements to restrict the liability of a common carrier, (which, of course, are sustained in some jurisdictions), wager-

ing contracts, *Wilkinson v. Tousley*, 16 Minn. 299; agreements tending to encourage litigation, as maintenance, *Findon v. Parker*, 11 M. & W. 682, or champerty, *Prosser v. Edmonds*, 1 Y. & C. 499. Nor is this judicial legislation confined to contract law. The history of the Rule against Perpetuities, whose domain is the law of real property, is the most striking example of its extent in the whole realm of law. Suggested by Lord Nottingham, contrary to the opinion of all the law judges, in Duke of Norfolk's case, 3 Ch. Cas. 1, extended to the case of infants in *Stephens v. Stephens*, Cas. temp. Talb. 228, and to a child *en ventre sa mere*, in *Long v. Blackall*, 7 T. R. 100, and to any number of lives in being in *Thelluson v. Woodford*, 11 Ves. 112; adding a fixed period of twenty-one years regardless of infancy, in *Beard v. Westcott*, 5 Taunt. 393; 5 B. & Ald. 801; T. & R. 25, and taking its final modern shape in *Cadell v. Palmer*, 1 Cl. & F. 372, the Rule against Perpetuities has not only earned an admitted place among the principles of real property law, but its value in prohibiting the indefinite tying up of real estate is admitted by every one. Nay, coming closer home, we find that the same objections which have been made by the courts to contracts have been made to conditions embodying the same idea when annexed to grants of real estate. In *Brown v. Peck*, 1 Eden 140, the testator annexed to a gift to his niece a condition that it should be cut down if she lived with her husband. The condition was disregarded as void. So also *Wren v. Bradley*, 2 De G. & S. 49. Evidently, therefore, the question how far an estate may be deprived of its usual legal incidents is simply one of public policy; or, as Pearson, J., says in *Re Rosher supra*: "It seems to me that, unintentionally and unwittingly, another principle has been applied here (forgetting entirely that the question whether a condition was good or bad should be determined by its repugnancy to the prior gift), and that the question of policy has been allowed to intervene, omitting altogether all considerations of repugnancy. Just as a general restraint of marriage was always held to be bad, but a restraint of marriage to one particular individual was always held, to be good, so, in the same way, although a restraint of alienation in general was decided to be bad, it seems

to have been thought that a restraint of alienation to one individual or his issue was not bad." Let us now examine the authorities to see how far the courts have permitted legal incidents to be detached from the various estates.

Let us dispose of the simplest questions first, regardless of the usual order of the various estates. It is, of course, familiar that the creator of a life estate, may, if he be so minded, relieve the life tenant from all liability for waste; in fact, the doctrine of equitable waste, or the imposition upon the tenant for life without impeachment of waste, of certain duties to the remainderman with respect to the preservation of the property is one of the recent illustrations of judicial legislation. See *Vane v. Barnard*, 3 Vern. 738; *Rolt v. Somerville*, 2 Eq. Cas. Ab. 759; *Lushington v. Boldero*, 15 Beav. 1, and *Turner v. Wright*, 2 De G. F. & J. 234. The reason is clear. The public has no interest, or at least only a very remote one, in the question whether a life tenant may commit waste; if he were owner in fee simple, of course he could destroy *ad libitum*, and, consequently, if the creator of his estate chooses to give him such right, as the public is indifferent, the remainderman cannot object, because he only takes what the testator's bounty gives him. If this is a correct statement of the principle, it would seem to follow (though I know of no authorities) that (1) the creator of the estate might, if he chose, relieve his life tenant from liability for equitable waste also; and (2) the creator of an estate tail might, if he chose, render the tenant in tail liable to remaindermen for waste.

On the other hand, it is well settled that, although prior to the Statute de Donis a condition against alienation by a tenant in tail was valid, *Anonymous Case*, 1 Leon. 292, yet since the statute, the policy of the law has changed, its purpose now is to encourage the freedom of property, various methods of barring entails have been devised, and such a condition is therefore invalid: *King v. Burchell*, Amb. 379. So, as Lord Coke said in the passage above quoted, a condition that tenant in tail should not suffer a common recovery is invalid, and for precisely the same reason. Indeed, it is just as obvious that the public is interested in having land freely alienable, as that the public is not interested in whether a life tenant may commit waste.

This brings us naturally to a condition that tenant in fee simple (or absolute owner of personalty) may not alien, and of course, if the policy of the law requires that tenant in tail may convert his estate into a fee simple so that he may alienate, it also requires that the tenant in fee cannot be restricted generally from alienating: *Ware v. Cann*, 10 B. & C. 433; *Shaw v. Ford*, 7 Ch. Div. 669; *Re Dugdale*, 38 Ch. Div. 176. Same rule as to absolute ownership of personalty: *Bradley v. Peixoto*, 3 Ves. 324; *Doe d. Norfolk v. Hawke*, 2 East. 481. There is one important exception, viz., that a married woman may have an equitable fee in property settled to her sole and separate use, and yet be deprived of the power to alienate her interest. Here the public interest in having property freely alienable yields to what the law regards as the more important consideration that the wife may enjoy the benefit of her separate estate free from the interference of her husband: *Baggett v. Meux*, 1 Phil. 627; *Wells v. McCall*, 64 Pa. 207.

When we leave estates of inheritance, however, and descend to estates for life (or for years), we find both a change in the policy of the law and (for the first time) a distinction between forfeiture and restraint upon alienation. In accordance with the foregoing principles we find that a proviso that a life tenant may not alienate his interest is invalid, *Brandon v. Robinson*, 1 Rose 197; *Halme v. Hutchinson*, 159 Pa. 133; *Ehrisman v. Sener*, 162 Pa. 577 (with, of course, an exception as to a married woman, *Jackson v. Hobhouse*, 2 Mer. 483); yet, on the other hand, it is equally well settled that a gift over upon alienation of a life tenant, or a gift to a tenant until he die or alienate, is good, *Rochford v. Hackman*, 9 Hare 475. It is submitted that this distinction is not a sound one. If the policy of the law is in favor of allowing every freehold tenant to enjoy the power of alienating his estate, then the law ought to hold invalid a provision like that in *Rochford v. Hackman*, *supra*, forfeiting his estate for alienation; if, on the other hand, the public welfare will not be injured by preventing tenant for life from alienating (as, of course, a tenant for years may be prohibited from assigning), then it is hard to see why, in *Brandon v. Robinson*, *supra*, the property should not be tied up in the life tenant's hands, as well as forfeited upon his

attempt to alienate. The law as it stands seems illogical. As to which of the two logical views should be adopted, some light is thrown by the cases which discuss the question how far a man may settle property of his own, reserving a life interest, with a proviso that if he alien, his interest shall terminate. In *Phipps v. Ennismore*, 4 Russ. 131, such provision was held invalid, on the ground that it is an attempt to invalidate one's own subsequent conveyance, and of course this principle, if correct, would not assist our decision. In *Brooke v. Pearson*, 27 Beav. 181, the provision was held valid, because it happened that the subsequent mortgagee was not injured; the decisions are reconcilable on the ground that such a provision is valid unless it injures the life tenant's own grantee. But in *Knight v. Browne*, 30 L. J. N. S. Ch. 649, Wood, V. C., expressly held such proviso valid. Finally, in *Re Pearson*, 3 Ch. Div. 807, such a proviso was held invalid, *Knight v. Browne* being distinguished on the ground that the gift over to the wife was part of a marriage settlement, but the decision is the less satisfactory, because the condition also included a forfeiture upon the life tenant's insolvency, and the court held that it operated as a fraud upon his creditors. The point is evidently unsettled. Evidently, however, the cases just cited assume that the restriction upon alienation by life tenant, if created by a stranger, would be held valid, and on the whole, this seems the sounder view. It is aided by the admitted rule that the lessee for years may be prohibited from alienating, and if no practical inconvenience has resulted from this, it is likely that none will from applying the same prohibition to a tenant for life. As to the case of the tenant for life having created his own estate, the cases can perhaps be reconciled by holding that such an arrangement is legally unobjectionable, *Brooke v. Pearson*, *supra*, especially in favor of a wife, *Knight v. Browne*, *supra*, unless its effect is to defeat either the tenant's own grantee, *Phipps v. Ennismore*, *supra*, or his creditors, *Re Pearson*, *supra*; practically the exceptions will prove so numerous that it would do no damage to admit the existence of the rule.

Perhaps the present is the most appropriate opportunity to advert to the question whether in this whole class of cases

there is any distinction between conditions and limitations. So far as conditions subsequent are concerned, there is apparently no distinction; a gift to A. and his heirs, until he alienate, and a gift to A. and his heirs with a proviso that if he alienate, then to B. and his heirs, are precisely equivalent. A. takes an absolute estate in fee simple in either case. But suppose the illegal condition is precedent, as a gift to A. and his heirs, provided he will live apart from his wife, or a gift to A. and his heirs, so long as he lives apart from his wife. In *Re Moore*, 39 Ch. Div. 116, held that under such a limitation as the latter, A. would not hold, except during such time as he lived apart from his wife, and yet, of course, the policy of the law is just as much infringed upon as in the former case, where evidently the condition would be disregarded, *Brown v. Peck*, *supra*. The decision in Moore's case is, however, probably right; it seems impossible, as Kay, J., points out, for the court to allow the beneficiary to take during the very period when the testator has forbidden it; it would be both an extension of his gift, and a hardship on the person who would take by default. The obvious difficulty of these cases, however, need not concern us. In the nature of things the attempt to limit the incidents of an estate must necessarily be in legal effect an estate with condition subsequent, and in the case of such conditions, as we have seen above, the difficulty does not arise. The distinction will, therefore, not be further noticed.

Turning from general restraints on alienation to partial restraints, we find the law to be in a state of confusion. In *Doe d. Gill v. Pearson*, 6 East 173, real estate was devised by a testator to his two daughters, Ann and Hannah, in fee "upon this special proviso and condition, that in case my said daughters Ann and Hannah Collett, or either of them shall have no lawful issue, that then and in such case they or she having no lawful issue as aforesaid shall have no power to dispose of her share in the said estates so above given to them except to her sister or sisters, or to their children." Ann died without having had any issue, but having shortly before her death levied a fine to the use of her husband, Wait. Lord Ellenborough held, in a somewhat unsatisfactory opinion, that the fine was invalid, as she had no power to alienate to her

husband ; he relied upon *Daniel v. Ubley*, Jones 137, where a devise "To a wife to dispose at her will and pleasure, and to give to which of her sons she pleased" was thought by a majority of the court to pass a fee simple with a valid condition attached ; but it was not necessary to decide the point. The case, if good law, goes a long way in sustaining partial restraints, as there were but two or three persons in existence to whom under the terms of the gift Ann could alienate. In *Attwater v. Attwater*, 18 Beav. 330, a gift in fee was conditioned, "if sold at all it must be to one of his brothers hereafter named." The condition was held invalid on the ground of repugnancy, and because if such a restraint were permitted it might readily be employed to evade the prohibition against alienation generally. But in *Re Macleay*, L. R. 20 Eq. 186, Jessel, M. R., held valid a condition that the devisee "never sells it out of the family," holding that a condition in partial restraint of alienation was valid, and distinguishing *Attwater v. Attwater*, *supra*, on the ground that the court thought the restraint in that case equivalent to a general restraint. In *Re Rosher* 26 Ch. Div. 801, a devise was made in fee, with a condition that if the devisee desired to sell, the testator's widow should have the option to buy at a price which was so low that the court thought it equivalent to a general restraint upon alienation, or at any rate to a restraint compelling a sale to a particular individual. The condition was held void. While the case may be distinguished from in *Re Macleay*, *supra*, on the ground that the condition amounted to a general restraint upon alienation, yet Pearson, J., strongly criticises Jessel's views, using an argument which will be hereafter referred to. The American cases are equally uncertain. In *McWilliams v. Nisly*, 2 S. & R. 507, we find a dictum that a prohibition to alienate to a particular individual is good, while in *Anderson v. Cary*, 36 Ohio St. 506, a condition that the two sons who were devisees should not alienate except to each other was held invalid. As Pearson, J., said : "What am I to say is the principle? Is it that there may be a condition that, if you alienate, you must alienate to a member of your own family, or that you must look to the number of the individuals to whom the alienation is permitted, or when there are a number

of individuals (not knowing at the present moment what the number may be), am I to inquire whether they are able, or likely to be willing, to purchase the property to which the condition is attached? If they are able and willing to purchase the property, am I to say that the condition is good, and if from their poverty they are unable, or if from other circumstances are unwilling, am I to say that the condition is bad? It seems to me that the adoption of any such rule as that would produce the greatest uncertainty and confusion; in fact it would be absolutely impossible for any judge to apply such a rule to any case which might come before him, unless the facts of the case were absolutely identical with those of some previously decided case."

But, as already urged, the difficulty of the problem is no reason why it should not be faced and solved by the courts. Holmes, J., in his *Common Law*, chap. 3, has pointed out with great clearness and force how, as the law imposes upon all the citizens the necessity of a knowledge of itself, so it should by degrees more exactly and accurately define for the benefit of its citizens those acts which have or may have attached to them legal penalties. Perhaps the most striking illustration of this function of the courts is the so-called "stop, look and listen" rule, so familiar to lawyers in Pennsylvania. What it means is that the law is now able to say to

man who is about to cross a railway track, instead of, as formerly, "You must take *due care*, and if the jury think you have been *negligent* you cannot in any event recover," now the law says, "You must *stop, look and listen*." In other words, the unsatisfactory, because indefinite, standard of reasonable care, involving the somewhat complex conception of a reasonable man, has been, in this class of cases, further defined in concrete language which even a child could understand—and the law is performing its function just so much more adequately than heretofore. Let us examine, therefore, how far public policy permits such partial restraints on alienation, remembering that even Pearson, J., concedes that they are permitted.

The only test suggested in the cases is that of Jessel, M. R., viz., "whether the condition takes away the whole power of

alienation substantially; it is a question of substance, and not of mere form." Pearson, J., while excepting to this principle, explains it admirably: "I apprehend that the meaning of the word 'substantially' is this: Does it really deprive the devisee of the power of alienation, or does it only so restrain it that in effect he still has the power of alienation? If the latter, it is good." Conceding with Pearson, J., that the test is vague and difficult of application, still it is precisely the same question which arises in cases of building contracts, where the plaintiff, though failing in some particulars, is yet entitled to recover something if his contract has been substantially performed; substantial performance is difficult to define,—nay, one jury may consider that performance substantial which another would not so consider, but it is better for the doctrine to exist in its defective form rather than resort to the simpler but harsher rule of turning the plaintiff out of court if he has not lived up to the letter of his agreement. A more scientific and apparently very equitable principle is suggested by Professor Gray, "Restraints on Alienation," p. 41: "That a condition is good if it allows of alienation to all the world with the exception of selected individuals or classes; but it is bad if it allows of alienation only to selected individuals or classes." This, of course, is not the law of England, since in *Re Macleay*, *supra*: but the few decisions in America are in accord with it, *Anderson v. Cary*, *supra*, *Gallinger v. Farlinger*, 6 U. C. C. P. 512, and it seems to afford a definite rule, by furnishing a plainly marked line which meets with the public's requirement that property shall on the whole be freely transferrable, and yet permits the grantor or testator to make an exception in the case of an objectionable individual, just as, he, of course, may make an exception against an objectionable use.¹

¹ The Canadian cases follow the English rule: *Earls v. McAlpine*, 27 Grant's Ch. (U. C.) 161; *Smith v. Faight*, 45 U. C. Q. B. 484, *In re Winstanley*, 6 Ont. Rep. 315; *O'Sullivan v. Phelan*, 17 Ont. Rep. 732. The leading American case advocating the doctrine of the invalidity of all partial restraints on alienation is *Mandelbaum v. McDonnell*, 29 Mich. 78; accord *Bennett v. Chapin*, 77 Mich. 538; *Potter v. Couch*, 141 U. S. 314. Some Massachusetts cases favor the English rule: *Gray v. Blanchard*, 8 Pick. 284; *Blackstone Bank v. Davis*, 21 Pick. 43; *Simonds v. Simonds*,

The next question is how far the creator of an estate in fee may control the devolution of the estate upon the death of the tenant in fee; it is here assumed that the tenant may, if he choose, alienate the estate during his life, but the further consideration assumes that he has not done so. If not, may the creator either (a) deprive the tenant of the right to devise it altogether, or (b) conceding him the right to devise, provide that in case of his failure to devise, the estate shall pass, not under the intestate laws, but to persons designated by the creator, as upon an executory limitation? The two phases indicated will be considered together, as they are so treated in the cases, although the principles governing them may be found to be not identical. In *Ware v. Cann*, 10 B. & C. 433, a testator devised an estate in fee to A., with a proviso that if he died without heirs, or if he offered to mortgage, or suffer a fine or recovery of it, then over to B. The latter proviso, of course, is invalid, and the King's Bench must have thought the former equally so, for they sent a short certificate to the Chancery that A. could give a good title in fee simple. Like most such certificates, the decision is unsatisfactory because no reasons are given; but the case certainly denies the original testator's right to dispose of the estate in any way upon the death of the tenant, for obviously if this limitation was invalid, a condition impairing the power of the tenant in fee to devise would be so *a fortiori*—it is a much greater infringement of such tenant's ordinary privileges. Precisely the same question arose, and was similarly decided in *Holmes v. Godson*, 8 DeG. M. & G. 152, where Turner, L. J., said: "This is in terms a disposition of real estate in favor of other devisees in the event of a devisee in fee dying intestate; and I think that such a disposition is repugnant and void. The law, which is founded on principles of public policy for the benefit of all who are subject to its provisions, has said that in the event of an owner in fee dying intestate, the estate shall go to his heir; 3 Met. 562. The similar early New York case of *Jackson v. Schutz*, 18 Johns. 184, was overruled in *De Peyster v. Michael*, 6 N. Y., 467. It may be noted that the parallel question of how long the power of alienation the power of alienation may be restricted has been fixed by statute in Michigan (2 How. Ann. Stat. § 5531) at "two lives in being at the creation of the estate." See *State v. Holmes*, 73 N. W. 548.

and this provision tends directly to contravene the law, and the policy on which it is founded." It will have been noticed that the reason assigned is the repugnancy—which we have already found not to be the true principle applicable to these cases; and when we advert to the proper test of public policy, it is by no means clear that public policy is injured by sustaining such conditions. Assuming that the owner in fee may not be restricted from alienating, assuming further for the moment (though we have not yet reached the cases) that the same policy will invalidate a clause prohibiting him from devising the land—yet his rights could hardly be affected by a proviso that, if he does not sell, and if he does not devise, then the estate shall go over; if he wants his heirs under the intestate laws to inherit in the proportions in which they would inherit under those laws, he may accomplish his purpose by making a will devising it to them in those proportions. The right to die intestate, so to speak, is a right whose very existence is questionable. While the law is probably settled by *Holmes v. Godson*, and subsequent cases, it is submitted that it is upon an illogical, or at any rate an inexpedient, foundation. *Shaw v. Ford*, 7 Chan. Div. 669, is a similar case, the proviso being in case the beneficiary died without issue—from which we may understand that the testator intended to deprive him of the power to devise—and, as intimated above, it may be readily admitted that such a condition would be against public policy. But no such distinction is taken by Fry, J., who in holding the gift over invalid stands squarely upon the cases cited: "*Prima facie*, and speaking generally, an estate given by will may be defeated upon the happening of any event; but that general rule is subject to many and important exceptions. One of those exceptions may, in my opinion, be expressed in this manner, that any executory devise defeating or abridging an estate in fee, by altering the course of its devolution, which is to take effect at the moment of devolution, and at no other time, is bad." *Ross v. Ross*, 1 Jac. & W. 154, is to the same effect, and other cases might be cited, as *Kaiker's Appeal*, 60 Pa. 141, and *Fisher v. Wister*, 154 Pa. 65, where the whole learning on the subject is admirably reviewed by R. C. Dale,

Esq., Master, whose report in favor of the English rule was adopted by the Supreme Court. The only case involving the denial of the right to devise alone is *Doe d. Stevenson v. Glover*, 1 C. B. 448: a gift in fee was here made by a testator to his son A., with a proviso that if he should die without leaving issue, or if he should not have disposed and parted with his interest, then over to B. The son died without issue, but made a will. B. claimed against the will. It was held by the court that the executory devise to B. was valid; that the intention of the testator was that A. should have power to alienate in his lifetime only. "The son might have prevented the devise ever from taking effect, by disposing of the property in his lifetime. But in the event of his not exercising that power, the estate is given over and nothing remains for him to part with by his will." The case can hardly be regarded as binding. It is flatly opposed to the cases just cited, and on principle a prohibition to will lands would seem to be as objectionable as a prohibition against alienation.

We come finally to the consideration of the question how far the creator of an estate may exempt it from liability for the payment of the debts of its owner. In spite of the great conflict of authority on this point, some questions may be regarded as entirely well settled. The same public policy which requires that an owner in fee may alienate generally, also requires that his estate shall be liable for the payment of his debts. Nor does it matter whether the condition takes the form of a limitation over upon the insolvency or bankruptcy of the tenant, or executions issuing against him, or whether it consists simply of a clause providing that the estate in his hands shall be exempt from liability for his debts. In *Re Dugdale*, 38 Ch. Div. 176, is a good illustration of the first class of cases. A testatrix devised property to trustees, giving her son A. an equitable fee, and adding that if he should "do, execute, commit or suffer any act, deed or thing whatsoever whereby or by reason or in consequence whereof, or if by operation of law, he would be deprived of the personal beneficial enjoyment of the said premises in his lifetime," then over. The court held that the executory gift over was bad, Kay, J. saying: "The events upon which the executory

devise in this case is to take effect seem to be (1) alienation, and (2) bankruptcy, or judgment and execution. The alienation contemplated is any alienation whatever by the devisee, not limited in any way. This is clearly invalid. With respect to the other event, bankruptcy or judgment and execution effect an involuntary alienation. Can a fee simple be divested by an executory devise on that event? The liability of an estate to be attached by creditors on a bankruptcy or judgment is an incident of the estate, and no attempt to deprive it of that incident by direct prohibition would be valid. If a testator, after giving an estate in fee simple to A, were to declare that such an estate should not be subject to the bankruptcy laws, that would clearly be inoperative. I apprehend that this is the test. An incident of the estate which cannot be directly taken away or prevented by the donor cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, or by a conditional limitation or executory devise which would cause it to shift to another person. *Peirce v. Roberts*, 1 M. & K, 4, is a case of the other class. A gift was made to trustees in trust to apply the income to the use of the testator's son, A. in such proportions, at such times and in such manner as the trustees should think best. A took the benefit of the Insolvent Debtor's Act, and it was held that his assignee was entitled to the fund: "The insolvent being the only person substantially entitled to this legacy, the attempt to continue in him the enjoyment of it, notwithstanding his insolvency, is in fraud of the law. The discretion of the executors determined by the insolvency, and the property passed by the assignment." But probably the best statement of public policy on this point is contained in the opinion in *Mebane v. Mebane*, 4 Ired. Eq. 131: there the testator had no hesitation in expressing his wish that his son's equitable fee should "not in any wise be subject to the debts" of the son. The estate was nevertheless held liable to the son's creditors, Ruffin, C. J., saying: "The doctrine rests upon these considerations: that a gift of the legal property in a thing includes the *jus disponendi*, and that a restriction on that right as a condition, is repugnant to the grant, and therefore void: And that, in a court of equity, a *cestui que* trust is looked on as the real

owner, and the trust governed in this respect by the same rules which govern legal interests; and, consequently, that it is equally repugnant to equitable ownership that the owner should not have the power of alienating his property. . . . That being so, it follows that the interest of the *cestui que* trust, whatever it may be, is liable in this court for his debts. For it would be a shame upon any system of law, if, through the medium of a trust of any kind of contrivance, property, from which a person is absolutely entitled to a comfortable, perhaps an affluent support, and over which he can exercise the highest right of property, namely, alienation, and which upon his death would undoubtedly be assets, should be shielded from the creditors of that person during his life. . . . Liability for debts ought to be, and is, just as much an incident of property as the *jus disponendi* is; for, indeed, it is one mode of exercising the power of disposition." The court fell into an error at the close of the opinion, through overlooking the distinction which has grown up in this particular between estates in fee simple and life estates: "The only manner in which creditors can be excluded is to exclude the debtor also from all benefit from, or interest in, the property, by such a limitation, upon the contingency of his bankruptcy or insolvency, as will determine his interest, and make it go to some other person." Not only is this generally true, but even in states like Pennsylvania, where spendthrift trusts are recognized as to equitable life interests, it seems to be conceded that equitable fees are liable to creditors: Keyser's Ap., 57 Pa. 236. Beck's Est., 133 Pa. 51, indeed goes so far as to hold valid a condition that a legacy shall not be attachable in the hands of the executor, and Barker's Est., 159 Pa. 518, holds that a spendthrift trust clause is valid to protect the interest of an equitable tenant in fee until his right to possession accrues (thus coming pretty close to the holding that an equitable fee may be protected by a spendthrift trust clause). But the latter case expressly recognizes the authority of Keyser's Ap., *supra*, and therefore it may be confidently asserted that even in Pennsylvania the general rule still prevails.

Turning to the lesser estate for life, we again find that a distinction has been taken between a gift for life with a limita-

tion or condition that upon the insolvency of the life tenant the estate shall go over or revert (where the condition or limitation has been held valid) and a gift for life with a proviso that the estate in the life tenant's hands shall not be liable for his debts, when the proviso (so far as legal life estates are concerned) has universally been held bad. An illustration of the first class is *Lockyer v. Savage*, 2 Stra. 947. Here an estate was given to trustees for the use of A. for life, and if he failed, then for the use of his wife and children. The gift over was held good, the court comparing it to the case of a lease in which the tenant is prohibited from assigning his interest, and thinking that creditors should not complain, because the donor may give to the bankrupt on what terms he chooses. The same principle was acted on in *Dommett v. Bedford*, 6 T. R. 684, and in a long opinion by Turner, V. C., in *Rockford v. Hackman*, 9 Hare, 475, where Lord Eldon's opinion in *Brandon v. Robinson*, 18 Ves. 429, is relied on as establishing the distinction between this and the latter class of cases. It is conceded, however, that a man may not settle his own property upon himself for life with a limitation over in the event of his own insolvency. This was first intimated in *Higinbotham v. Holme*, 19 Ves. 88 (which, however, partly turned upon the question of actual fraud), and was expressly decided in *Lester v. Garland*, 5 Sim. 205. See also *Synge v. Synge*, 4 Ir. Ch. 337. Of the latter group of cases, *Graves v. Dolphin*, 1 Sim. 66, is perhaps the earliest example; a proviso that an annuity should be exempt from liability for the annuitant's debts was held void. The law is well settled: *Youngehusband v. Gisorne*, 1 Coll. 400; and applies even where a trust is created, if the *cestui que* trust is also trustee, so that he has the legal title: *Hahn v. Hutchinson*, 159 Pa. 133; *Ehrisman v. Sener*, 162 Pa. 577.

It is of course too late, except by legislative enactment, to alter so well-settled a distinction, and yet it seems on principle very questionable whether such a distinction is well founded. It would seem much more consistent and logical for those courts which sustain spendthrift trusts to hold that, as the policy of the law is not opposed to a life tenant holding his property free from his debts, not only is a gift ever con-

ditional upon his insolvency valid (*Rochford v. Hackman, supra*), but that a direct legal estate for life might equally be made exempt from liability for debts: why should public policy insist upon the formality of a trust? On the other hand, it would seem that these courts which condemn spendthrift trusts, should not only condemn a clause exempting a legal life estate from liability for debts (*Graves v. Dolphin, supra*), but also should hold invalid a clause providing for a gift over upon the life tenant's becoming insolvent—just as they of course would hold invalid a clause providing for a gift over in favor of the criminal upon the life tenant's being murdered; in the latter case they would not hesitate to subordinate the testator's wishes to considerations of public policy—why should they in the former, and thus allow their aversion of spendthrift trusts to be evaded, by simply providing that, upon the life tenant's insolvency, the estate shall vest in (say) his wife and children? The very fact that according to all the decisions a man may not create a life estate for himself determinable upon his insolvency (*Lester v. Garland, supra*), is a strong argument in favor of this view; leaving actual fraud out of the case, and assuming that the man is amply justified in laying aside a given sum of money, why should he not be permitted to treat it the same as a stranger? If he may give it away absolutely, as of course he may, why may he not do the less harmful act, so far as his creditors are concerned, of reserving an equitable life interest for himself, and if he may do so, why may not (fraud again excepted) that life interest be determinable upon the same event which would terminate his life interest created by a stranger? In fact, the futility of the distinction is proven by the fact that, in the illustration just suggested, the man of means might make a gift outright to a friend, and the friend might immediately settle the same sum upon trustees, giving the donor a life estate determinable upon his insolvency; what merit has a distinction that could be so readily evaded?

These considerations lead us naturally to the much discussed problem whether, admitting that an equitable fee may not be exempted from liability, admitting likewise that a legal life estate may not be so exempted, admitting finally that the or-

dinary equitable life estate is not so exempted, yet may an equitable life estate be created in such a way that because of the creator's expressed wish, the life tenant may hold the estate free from such liability? It is not proposed to narrate the conflicting views on this subject. Every lawyer knows that such trusts are not sustained in England, and in many of our states. *Tillinghast v. Bradford*, 5 R. I. 205, is often cited as the leading case in support of this view. The court said: "Such restraints are so opposed to the nature of property—and so far as subjectedness to debts is concerned, to the honest policy of the law,—as to be totally void." Every lawyer knows, too, that the decisions supporting spendthrift trusts originated in Pennsylvania in *Fisher v. Taylor*, 2 Rawle 33, and that the doctrine, though endangered for awhile (*Overman's Appeal*, 88 Pa. 276), is now well settled, not only in Pennsylvania, but in many other states, including Massachusetts (where the important case of *Broadway Bank v. Adams*, 133 Mass. 170 did much to establish the doctrine), and that the Supreme Court of the United States even went out of its way to express its adherence to the so-called American doctrine (Miller, J's opinion in *Nichols v. Eaton*, 91 U. S. 716). Professor Gray's "Restraints on Alienation," written, as the author says, for the express purpose of combatting spendthrift trusts, so far from accomplishing its purpose, seems simply to mark a period of their new activity. It is proposed simply to examine the various arguments that have been adduced for or against them.

It is hoped that enough has been said to show that repugnancy has nothing to do with the question,—that it is simply one of public policy. It should be further borne in mind that public policy has universally decided against permitting estates in fee simple, whether legal or equitable, to be held free from liability for the owner's debts, and that the same rule universally exists with respect to legal life estates; the only question is as to equitable life estates. The earliest argument in favor of such spendthrift trusts is found in *Fisher v. Taylor*, 2 Rawle 33. Smith, J., said: "A different construction would make the beneficial interest, which the testator intended to provide for his son, subject to be sold for his debts, when he expressly

declared that it should not be so subject, and would thus set up a new will in place of that which it affected to interpret." In other words, the testator's wishes must be respected; and this argument has been reiterated through the cases. It would be an affectation to cite cases to show, however, that when you have determined the testator's intention, you have simply reached the difficulty, not solved it; of course, the testator's intention must be disregarded wherever it comes in conflict with the policy of the law. The fact that, in spite of the testator's intention, an equitable fee is always liable for the owner's debts is conclusive upon this point. Abandoning this ground, the supporters of spendthrift trusts next argue that creditors are the only persons who can complain, and they may not because they have constructive notice through the recording of wills and deeds of the terms of such trusts, and should not give credit upon the faith of such estates: Miller, J., elaborates the argument at length in *Nichols v. Eaton*, *supra*, and relies upon the analogy of exemption laws which exist in every State. And Morton, C. J., in *Broadway Bank v. Adams*, *supra*, adds: "There is the same danger of their being misled by false appearances, and induced to give credit to the equitable life tenant when the will or deed of trust provides for a cesser or limitation over in case of an attempted alienation, or of bankruptcy or attachment, and the argument would lead to the conclusion that the English rule is equally in violation of public policy." It may be remarked, in passing, that so far from proving that spendthrift trusts are valid, C. J. Morton's view is a valuable argument in favor of the position advanced above that estates terminating upon insolvency should be held invalid just like estates attempted to be created free from liability for the owner's debts. But reverting to Justice Miller's proposition, we must take issue with both branches of it and deny (1) that the public has always constructive notice of the terms of such trusts; and (2) that the *cestui que* trust's creditors are the only persons who may complain of spendthrift trusts. As to the first, while it must be conceded under the laws of the various States, that both wills and deeds of real estate are bound to be registered, where the public may examine them, yet there is no such requirement with respect

to deeds of personalty; and it is a well-known fact that many spendthrift trusts are created of personalty by deed *inter vivos*. It is not true, therefore, that the creditor may always protect himself. Passing this point, however, and assuming for the sake of argument that all creditors have constructive notice of all such trusts, we come to the much more important denial that the creditors are the only persons who may complain. The community as a whole is much interested in the question whether a man may be allowed to enjoy property without subjecting it to liability for his debts: what is the natural tendency of such spendthrift trusts? Is it not to encourage in the beneficiary a feeling of irresponsibility—a feeling that the property is being cared for by a presumably competent trustee, and that he need not only give it no attention but if the income is sufficient, live in idleness and luxury, knowing that as long as he lives he will be comfortably supported? The difference between this and the ordinary trust estate is obvious—in the latter the beneficiary's interest is as liable to execution, principal and income, as if it were in his own hands. Suppose any considerable part of the trust funds of the country were so safeguarded, does any one doubt that the result would appear in an incompetent and lazy generation? And, if so, who would weigh for a moment the wishes of the creator of the trust as against the interests of the community? These arguments have a special weight at the present time. For what is the essence of the vague, but rapidly growing, feeling against "trusts," so-called? Is it not that they permit capital to influence and interfere with the rights of liberty, as understood by the Anglo Saxon race? And is the right to compel a man to yield up his possessions for the payment of his debts at all less inherent and less valuable, than the right to trade unrestricted by anything except by natural competition? If conferences are held and political parties forming, to assert the latter right, may we not feel confident that they will likewise attack the former? Let our courts beware lest unconsciously in sustaining spendthrift trusts they may be creating another bone of contention in the impending controversy between labor and capital, rich and poor.

The writer does not lay claim to any originality of re-

search in this paper. He will be quite satisfied if he shall have demonstrated that the questions discussed herein are all not questions of repugnancy at all, but questions of public policy, and therefore to be resolved by the courts, not upon strict logical analysis and deduction, but upon a consideration of the ultimate highest good of the community.

Reynolds D. Brown.

THE VALUE OF ROMAN LAW.

One of the most significant and encouraging features in connection with present attempts to elevate the training afforded by American Law Schools is the augmenting importance which a few of such institutions are beginning to attach to the study of the civil law. This movement, slight though it may as yet appear to be, seems destined to mark an epoch in the history of legal education in the United States and can scarcely fail to exert a most salutary influence on the whole legal profession. Not that the subject has ever failed to attract attention in this country; for who can be unmindful of the names of such jurists as Kent, Cooper, and Hammond—jurists who never wearied either of emphasizing the value of Roman law or of illustrating the vast treasures contained in its inexhaustible sources? In point of fact, moreover, each period of our history has had its small but earnest band of civilians. But notwithstanding these facts the civil law has never received from us that general attention its importance merits, and the profession has been obliged to pay a very heavy penalty for this neglect. To verify this point one will find abundant evidence, but perhaps one would not have to go further in search of it than to many of our Law Schools with their bread-and-butter courses of instruction. It is this shop-view of education—unfortunately prevalent in too many places—that stands out in such striking contrast with the critical analytical atmosphere pervading all of our large universities and training schools. The Law Schools therefore cannot afford to lag behind the theological, medical, and scientific departments, and the very best antidote for this impending commercialization of legal education and the legal profession is to be found in the study of law as a science. And this is, of course, impossible without a knowledge of Roman law. Another striking illustration of the bad results which flow from the neglect of the civil law is furnished by almost any one of our

numerous codes whose lack of scientific classification and precise expression is so fruitful a source of litigation. The same slovenly characteristics are also to be met with in many of the law books that issue annually from the press of various energetic law firms often to bewilder where they should inform and to increase unnecessarily the already bulky state of law literature. Indeed, the authors of such books seem frequently to be imbued with the notion that the possession of a pair of scissors and a paste-pot is the main prerequisite for writing—and the direful results of such fatuous ideas may easily be imagined; but it is surely matter for regret to experience that notwithstanding the endless multiplication of law books one finds it more and more rare to secure a volume by an American writer that really treats any subject at all in a manner at once brief, accurate, and scholarly. We are speaking in a general way, of course, and without reference to the very high class of work that has so frequently emanated from two or three Law Schools, to say nothing of other notable exceptions which will readily occur to the intelligent reader. Excluding these, therefore, our law books are far too frequently either digests pure and simple that have been compiled by comparatively unknown persons, or mere pirated editions of English works, the theft being thinly veiled by a liberal sprinkling of American cases. Much of this state of things may be ascribed, to be sure, to the materialistic spirit of the age; but that a great deal more of it may be traced directly to ignorance of Roman law and the higher branches of jurisprudence that have been founded on it, is a fact which few can really seriously gainsay.

But, as previously intimated, there has always existed in the United States a small circle of practitioners and instructors interested in the cultivation of the Roman law, and it is earnestly to be hoped that their number may continually increase. The publication, for example, by Judge Howe, of Louisiana, of the lectures he delivered a few years ago to the law students of the University of Pennsylvania and other institutions will always occupy a high place among

American law works. Another well-known civilian is Dr. Munroe Smith, of Columbia University, New York, whose scholarly researches in this field require no commendation at our hands. The names of these two gentlemen will serve also to indicate the two sets of influences which, until quite recently, have permeated most of the instruction given by American lecturers on Roman law. These influences may be designated briefly as French and German. Practicing his profession in a Commonwealth whose laws are in a great measure borrowed from the Napoleonic code, it is natural that Judge Howe should resort to French authorities and, like them, regard the subject of Roman law from a somewhat practical point of view. Dr. Smith, on the other hand, received his juristic training at a German University and he necessarily betrays, at times, the theoretical but always thorough, characteristics of his Teutonic guides. But the one influence is the complement of the other, and we could ill afford to spare either. For notwithstanding the fact that the Germans insist that the Roman law was never adopted by their nation, but only "received," into the country, nowhere else has it been more patiently investigated or more brilliantly elucidated. Nor is it probable that the new code of the empire, which went into effect at the beginning of the present year, will seriously affect their extraordinary activity in this domain. French activity in the same direction is scarcely behind that of the German—a fact that will become sufficiently obvious to any one who takes the trouble to consult a catalogue of law books that may emanate from Paris, not to mention the long line of French jurists of former times. Meanwhile the third influence exerted on American instruction in Roman law has only recently manifested itself in any marked degree. We refer, of course, to that which has come to us from England since the revival, so to speak, of that country's interest in the civil law. This influence, however, is for the most part confined to those who are engaged in teaching the subject of Roman law to the undergraduates of a few colleges and universities. Un-

fortunately, however, such instruction is more often than otherwise of a most elementary nature and appears to lay stress rather on the history of Roman law than on the law itself. In this respect, therefore, lecturers of this type sometimes recall the Italian glossarists of the Middle Ages, whose servile adherence to commentaries caused them to ignore original sources and to teach their pupils a similar fatal habit.

It would be a very grave mistake to fancy from the foregoing observations, however, that nothing is being done by our kinsmen across the Atlantic to foster the cultivation of the civil law. Thanks to the researches of publicists like Maine, Muirhead, Bryce, Markby, and others, to say nothing of the potent result of English social and territorial expansion, much has been accomplished in the way of emancipating the professional mind from many of those illiberal opinions that dwarfed the legal conceptions of earlier writers on law; and systematic courses of lectures in Roman law are now offered not only at Oxford and Cambridge, but also at the Inns of Court—the time-honored seat of common law culture. And it is scarcely necessary to add that in Scotland, whose legal system rests on the civil law, this branch of learning has long received the most careful nurture. In England, however, the progress of the study of Roman law has not been a smooth one; for implicated as the subject has been with the passionate religious dissensions of former times, men either saw, or professed to see, in their own system of jurisprudence the symbol of national freedom and sovereignty and in that of Rome the title of a hated foreign hierarchy. These prejudices were undoubtedly heightened by England's geographical isolation, which became a moral one after the Reformation had cut off the country from the great intellectual movements of western Europe. In the meantime, ignorant or selfish panegyrists of the common law not infrequently appealed to the most ignoble passions of their countrymen in order to further their own views or interests, and along with the body of the

English law which our forefathers brought with them to America, were imported not a few of the prejudices that had gathered around that system.

Blackstone well understood how to appeal to the state of mind we have just been describing when he sought to persuade his complacent readers that they possessed not only the wisest system of jurisprudence ever devised, but one also that had been least contaminated by Roman influences. Now it is very far from our purpose to depreciate either Sir William or the English common law. Like many others, we believe his immortal treatise to be the best and clearest introduction to the study of our law, extant; and no one could seriously advocate the substitution of the civil law for the common. At the same time this does not prevent us from saying that as a historian Blackstone is an unsafe guide, and that as a critic of Roman law he is often too partisan or uninformed for one to follow him. It is impossible, therefore, to escape the conviction that a full and complete knowledge of the English common law can not be gained without an acquaintance with that portion, at least, of the Roman law which has so materially aided in shaping its growth. In the very arrangement of his subjects, for example, Blackstone follows the Institutes of Justinian closely enough to convince any one of the debt he owes a system he often affects to despise, whilst Bracton, on whom he largely relies, took verbatim a large part of his material from the *Corpus Juris Civilis*. Other forerunners of Blackstone exhibit the same plagiarisms. But it ought not to be forgotten that when Blackstone wrote his work the bulk of English wealth was represented by landed interests. Hence the various modes of acquiring title to realty, the canons of descent, the modes of classifying estates, and the various other feudal rules governing interests in land are for the most part of purely indigenous origin. Accordingly, most of the early English law treatises were in large measure devoted to the subject of the law of real estate, whilst disputes in respect to the ownership and possession of this species of property

gave rise, perhaps, to the greatest number of cases tried before the court of common pleas. Trade was despised. Modern inventions and discoveries had not yet inaugurated the present type of industrial society. The age was distinctively an agricultural one. Corporations for business purposes were almost unknown, and, as contrasted with real property, personalty occupied a very inconspicuous position. Nor is it probably necessary to do more than call attention to the fact that the principle of contract was still struggling to free itself from the thralldom of status. Despite his partisan bias, therefore, Blackstone was forced to recognize the manner in which English common law judges had been obliged, at times, to resort to the *Corpus Juris Civilis* as society developed from the agricultural into the industrial stage and questions relating to personal property assumed greater and greater prominence. Nor does he neglect to comment on the influence exerted by the Roman law through the intervention of the clergy, whose long usurpation of jurisdiction over matrimonial and testamentary causes gave to those branches of our law many of those Latin characteristics which they still retain. The canonical impediments to marriage, the various grounds of divorce and separation, the law governing the administration and division of the personal property of an intestate, the perpetuity of corporate existence, the representative character of executors, and the various other principles relating to family law and to the law of personality furnished Sir William with abundant illustrations of Roman influences; but he was able to do a great deal towards practically closing to the English-speaking race, for many years, the whole subject of the civil law.

When we approach the gradual amelioration of the rigid rules of the common law by the principles of the chancery court, we encounter something akin to the triumph at Rome of the *jus gentium* over the narrow *jus civile*. Indeed, equitable titles, equitable rights, and equitable remedies all furnish evidence of the most convincing nature of the presence of Roman influences, and all of us are familiar with the

fact that for a number of years the chancellors were ecclesiastics untrained in the common law, but well acquainted with the principles of the civil and the canon law, to both of which they so frequently resorted. Hence, even where all distinctions have at last been abolished between the two sorts of remedies which for so long a time prevailed in English-speaking courts of justice, it is still extremely difficult, without some knowledge of Roman law, to obtain a clear idea of the inherent differences between two species of rights that are almost sure to arise under any system of procedure.

In view of what has been remarked above it will probably not be very far from the mark to say that of our private substantive law the branches relating to landed interests are those of purest native origin, although even these are not entirely free from Roman influences. Much might be written, for example, of the presence of such influences in the law of easements. On the other hand, so much of the English law as pertains to domestic relations and personal property is drawn, for reasons already sufficiently indicated, largely from Roman sources. The principles that were gradually established by the court of chancery may be traced to a similar source. And even that portion of the law of domestic relations which is commonly regarded as of purest English origin, namely, the law of husband and wife, has been so modified of late by equity and legislation that it is rapidly approaching the Roman type. English adjective law, however, or the law of procedure, is, to a great extent, of native extraction, except in so far as the law of equity procedure is concerned. English public law, including the law of crimes, has also been but slightly modified by the civil law. Here political considerations seem to have outweighed all others, whilst the territorial theory of jurisdiction over crimes aided materially in preserving intact the old system of law. But, as we shall presently see, that portion of public law that concerns external relations has been very much affected by Roman law. Aside, however, from considerations arising from the implication of Roman law with

the common law there are others of scarcely less weight, which are well calculated to arouse an interest in the former among those who study the latter. To the active practitioner, for example, the most valuable part of the civil law is that which is concerned with private rights and of these those arising from contractual and quasi-contractual relations stand pre-eminent.

Now, in this field, the juriconsults are frequently without modern rivals, for their reasoning is often as near perfect as the human mind can possibly approach. Indeed, even in the law of delicts, as Sir Frederick Pollock has so forcibly demonstrated, the civil law may be made to yield a flood of light. Nor need we do more than mention the obligation of admiralty law to Roman law. Following the practice of the old English judges, we still resort therefore to the *Corpus Juris Civilis* whenever precedents cannot be found elsewhere. And it has been claimed that Justice White's elevation to the Supreme Bench of the United States was due largely to his familiarity with the civil law.

Before dismissing the practical aspects of this subject, one or two other points may be briefly referred to. The necessity of codifying laws for the millions who have come under our government by virtue of the recent treaty with Spain becomes more apparent and difficult every day. Here again we may be able to profit by the experience of the old country. Every one knows what that experience has been. It seems that those Englishmen who were entrusted with the delicate and irksome task of framing and interpreting laws for the peoples of India early discerned the wisdom of clear analysis and the possession of a system of procedure less cumbersome than that furnished by the old common law. It was further recognized that those who had been thus called upon to administer the English law in regions far-removed from extensive libraries would be compelled to rely more on positive enactments than on general principles gathered from many and often conflicting sources, and it was accordingly not very long before Parliament took up the subject. Such was

the beginning of that series of great statutes which must eventually recast the greater part of the so-called unwritten law and give to English jurisprudence a simplicity and homogeneity it has never hitherto enjoyed. And while it might perhaps be out of place to discuss in this connection the relative advantages of written and unwritten law, it may be remarked that the study of Roman law appears to lead inevitably towards codification. Judging, therefore, from recent parliamentary enactments, one is inclined to believe that the jurists of the mother country are in many respects far less conservative than are the jurists of the United States. And that this liberalization of the English professional mind may be attributed, in no slight measure, to the recent impetus given the study of Roman law by social and colonial problems, is a fact which will become sufficiently clear to all who examine the subject carefully. May not this experience of England convey to us then a most wholesome lesson in the present conjuncture of our foreign affairs? Congress is already endeavoring to frame systems of private law for the inhabitants of our newly-acquired possessions and in many respects this task is not rendered any the lighter by reason of the federal character of our government and the absence of a national common law. But in several other respects our difficulties may not prove so great as those experienced by the British Government in the Orient; for the very absence of an unwritten system of national law will probably have the effect of hastening action. Then again the Spaniards have already introduced into the island their own legal institutions, which are largely drawn from Roman sources. Hence it will not be wise to leave so vital an interest entirely to the omnipotence of legislators whose misdirected efforts can involve the whole subject in hopeless confusion. Accordingly, it seems very obvious that we shall soon be forced to take up the study of Roman law with an earnestness never before approached, and this step will be found necessary not only for the purpose of aiding proper commissions to understand the legal situation in our island

possessions—for no one would probably be so unwise as to wish to destroy entirely the old Spanish law now there—but also for the purpose of framing for the inhabitants of our recently acquired territory such laws as their altered condition may from time to time demand.

But as suggested already, these aspects of the subject are by no means the most important; for without some knowledge of Roman law it is impossible for one to grasp the principles of those higher branches of jurisprudence whose value becomes more clearly recognized whenever there is a clash between progressive society and existing institutions. New wine cannot be put into old bottles. Nor has it remained for our generation to make this discovery. Men of other times and countries have faced the same baffling difficulties which they attempted to surmount at first by means of the tortuous methods of fictions and then by the more direct intervention of equitable rules. Both in Rome and in England, however, the latter agency having finally overcome the ancient procedure, suffered in some respects from the same evils that had overtaken the older law. Later on, therefore, legislation was invoked to remedy evils that arose from the apotheosis of custom and the inflexibility of positive law in general; but the partial failure, in some quarters, of representative institutions has brought about the inevitable reaction and there is a growing disposition to rely more and more on commissions composed of specialists. Never before, therefore, has there been such a need for thoroughly trained lawyers and they can no more afford to ignore the productions of the jurisconsults than modern painters can afford to ignore the masterpieces of ancient and mediæval culture. The Latin language, moreover, is not only the best vehicle for the expression of juristic ideas, but the nomenclature of the Roman law writers is used by all publicists who treat the subjects pertaining to our profession in anything like a scientific manner. And as all the world knows, the genius of the Latin race was above everything else, a legal one. The contributions of this people to jurisprudence caused Von Ihering to remark that the Romans gave to the whole civilized

world its code of laws three different times. There was first the code of Justinian, which was prepared for the world-wide empire of the sixth century; then came the code of Gratian, founded in large measure on the *Corpus Juris Civilis* and patterned after it, which furnished Catholic Christianity with its canon law; and, finally, there was the influence exerted on the positive law of every European country by the universal study of Roman law after the revival of learning. And it was this intermingling of the law of the Romans with that of their Teutonic conquerors that has given rise to modern European legal systems, just as the mixture of the blood of the two peoples formed modern European states. It is true that the Latin strain is more predominant in some countries than in others, but that it is everywhere present is a fact that requires no argument.

Jurists of all schools recognize these facts, and whether we pick up a book on analytical, comparative, or historical jurisprudence we find it filled with the ideas and phraseology of Roman writers. The mere possession, therefore, of such a mass of legal literature as that found in the *Corpus Juris Civilis* is a boon to the human race; for we are thus enabled to trace, step by step, for a thousand years, the progress of the law of the most gifted nation of antiquity. Their experiences were often strikingly like those we have encountered. There was in the beginning the same rigid inflexible body of customary law which was softened at first by means of fictions and eventually by the liberal rules of the curator, or the chancellor, as an English-speaking person would say. And while the conservative nature of the Roman people often prevented them from admitting that alterations had been made in their law even after the most sweeping changes had been effected, they were ordinarily wise enough to yield, in practice, to the vicissitudes of time and adopt their jurisprudence to the changing needs of society. But interest in the study of Roman law is confined to no single profession; for no one can claim to belong to the educated class who does not possess at least an elementary knowledge of the subject. It is not necessary, for example, to

remind any one of the great value of such knowledge to the classical scholar. Then again there is the light which a knowledge of the civil law throws upon the history not only of Rome but that of the entire world. Such questions in Roman history, for example, as the gradual enjoyment by foreigners of all the rights of Roman citizenship; the struggles between the patricians and the plebeians; the extension of the Roman law to the provinces; the results of the separation of law from religion; the consequences of too great a freedom in the matter of divorce; and the effect of substituting the empire for the republic—all these great and eternal questions can only be understood thoroughly by studying them in connection with Roman law. But if a knowledge of Roman law is valuable to students of classical antiquities, it is for many reasons of perhaps even greater value to the student of universal history. No one has made this subject clearer than Savigny, who shows so well how, through the events of the Middle Ages, Roman law has entered like a red thread into the texture of every nation's political life. The Popes were but the successors of the Cæsars; the *Corpus Juris Canonici*, simply the counterpart of the *Corpus Juris Civilis*. One word more. It was the thought and language of the Roman law that crept into almost every branch of mediæval learning and gave to modern ethics and theology some of their most familiar doctrines and expressions—a fact which caused many of our earlier judges no end of trouble by reason of the use of identical words in a twofold sense, namely, a moral and a legal one.

Before indicating more definitely what portion of the civil law might be studied most advantageously in connection with the courses in municipal law which are already offered by American Law Schools, mention should be made of another very important branch of general culture that owes a great deal of its learning to Roman law. We refer to international law, for Grotius, Puffendorf, Vattel, and other fathers of this science were all eminent civilians who constructed the science of international law almost entirely upon the principles of the civil law—a fact too sufficiently well

known to require extended discussion. When we consider, therefore, the entrance of our nation into closer relation with the rest of the world and the practical interest this subject will have for us in the future, we can readily understand the transcendent importance of Roman law from still another point of view. Thus, for a fourth time, has Rome given the law to civilized nations, for international law is nothing more or less than the public law of the world. And as Sir Henry Maine has so forcibly pointed out, the governments of the various western nations may be regarded, in this respect, as so many Roman landlords.

In concluding we may now perceive what branches of civil law may be profitably studied by law students. And while it is true that several of our law schools make provision, in what are called post-graduate departments, for lectures on Roman law and kindred topics, it may be urged that those just taking up the study of the law may derive a great deal of assistance from such courses. Now one of the most difficult matters the average beginner experiences is to comprehend the difference between law and equity. He so often complains that having learned a certain rule he must soon unlearn it because of the magic of this mysterious chancery court; and it is also easy for him to acquire the notion that the law consists of a set of lifeless, inflexible rules instead of being an organism with all the characteristics of other organisms. That these obstacles may, in most instances, be overcome by taking even the novice through an elementary course in Roman law will become patent to all who try the experiment. This is said with a full realization of the already enormous amount of work on the part of Law Schools which has been rendered necessary partly through the multiplicity of branches of law arising from industrial development and partly through the haste of the student to complete an education already unnecessarily prolonged by reason of the stubborn adherence of most colleges to the four years' course for undergraduates. By resorting more frequently to the source we avoid many accretions the current has received during its onward flow and which seem at

times well calculated to deflect it from its course. Accordingly, there seems to be every reason for believing that for the purposes of instruction in Roman law at those schools which make no provision therefor at present, a course might be arranged somewhat as follows, either as an auxiliary to the regular course in positive law or as an introduction to lectures on higher jurisprudence :

1. *A general outline of the subject.*—This ought to be a purely introductory course designed to acquaint the beginner with the concepts and history of Roman law. The basis of instruction might very well be the excellent little manual of the late Professor Hadley or that of Mr. Hunter, with constant references to larger works. Three hours weekly for half a year would prepare the student for the next course, and so far from interfering with his regular work, would be a positive gain for him.

2. *Justinian's Institutes.* Those who have taken this preparatory course are ready to take up the study of the Institutes. It is scarcely necessary to add that this work ought to be studied in the original, which is not difficult reading ; but of course those who are ignorant of Latin may find a number of excellent translations. The small compass of the Institutes, compiled as is well known, for the use of law students, will enable one to go through all the books very rapidly. Naturally, however, some parts of the work will require more attention than others. Thrice weekly for the rest of the first year should carry the student through the volume.

3. *The Pandects.* Having mastered the above two courses a student ought to be well enough prepared to take a systematic course in the Pandects, or Digest. The immense size of this part of the *Corpus Juris Civilis* will render its thorough investigation impossible, but three hours weekly for the second year would do much towards familiarizing the student with the ideas of representative jurisconsults and teaching him how to use authorities.

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A HUNDRED AND TEN YEARS OF THE CONSTITUTION.—PART IX.*

After a short discussion, the question was postponed, in turn, and the clause relating to the originating of money bills was taken up. It was urged that this was placing a very important power in the hands of the direct representatives of the people—and was, to that extent at least, a concession on the part of the small states in return for the concession on the part of the large states of equal representation in the second branch. It was not so regarded, however, by Mr. Wilson and others who shared his general ideas. Since both branches must concur in passing money bills, they could not see wherein the advantage lay, in giving the first branch the sole power of originating them. While, possibly, the "concession" did not amount to much practically, it certainly has a distinct recognition that the new government was to be one dependent in the first instance on the *people as such*—an idea necessarily foreign to a mere confederacy. The clause was carried (as part of the report) by a plurality vote—ayes, five—Connecticut, New Jersey, Delaware, Maryland, North Carolina; noes, three—Pennsylvania, Virginia, South Carolina; divided, three—Massachusetts, New York, Georgia. A grouping which it is hopeless to attempt to analyze.

Once more, the question as to equality of suffrage in the second branch now came before the convention—and was carried as part of the report,—several votes being given affirmatively now, because another vote was to be taken on the report itself—that is, these votes did not commit the voters to final approval of the measure. Mr. Gerry appears to have recognized the hopelessness of an agreement upon any other basis—and expressed himself as ready to agree to it on that account. But there were others who felt that equal representation in

* The series of articles by Mr. Landreth on the Constitution was discontinued in the March and April numbers owing to the lack of space caused by the publication of the addresses delivered at the opening exercises of the new Law School Building of the University of Pennsylvania. The series will conclude with the July number.

either branch would ruin the whole system of government for which they were so earnestly striving. In a warm and very clear speech, Mr. Gouverneur Morris urged upon the convention the duty of acting for America as a whole,—and Mr. Patterson again declared with great positiveness that equal representation in at least one branch was vital to the small states. There were a few men who saw—or thought they saw—that a government founded on both people and states was not only possible but desirable. The question was once more postponed to await the report of the committee appointed to consider the proposed basis of “one to every forty thousand inhabitants” in the first branch. That committee reported a scheme of representation which has a strange sound to the ears of to-day: “That in the first meeting of the [national] legislature, the first branch thereof consist of fifty-six members, of which number New Hampshire shall have 2, Massachusetts, 7, Rhode Island, 1, Connecticut 4, New York, 5, New Jersey, 3, Pennsylvania, 8, Delaware, 1, Maryland 4, Virginia, 9, North Carolina, 5, South Carolina, 5, Georgia, 2. But as the present situation of the states may probably alter as well in point of wealth as in the number of their inhabitants, that the legislature be authorized from time to time to augment the number of representatives. And in case any of the states shall hereafter be divided or any two or more states united, or any new states created within the limits of the United States, the legislature shall possess authority to regulate the number of representatives in any of the foregoing cases, upon the principles of their wealth and number of inhabitants.” These propositions were somewhat puzzling to the members, and it was stated in reply to the question as to what principle they were founded on, that while little more than a guess, it was still an effort to base the representation upon population and supposed wealth. The objections to the simple rule of one to every forty thousand inhabitants were, that the representatives would soon become too numerous, and that the western states might, if admitted on this principle, soon outvote the Atlantic states—but under the plan proposed, “the Atlantic states having the government in their own hands, may take care of their own interest, by dealing out

the right of representation in safe proportions to the western states." This explanation was apparently clear—and there is no evidence that the proposition in so many words deliberately to keep a larger share of popular representation in the Atlantic states, caused any surprise, still less any shock, to the mind of anyone. It was not until two days later that Mr. Mason said that the western states must be admitted, if at all, on terms of equality. There was, it is evident, an almost ineradicable "sectionalism" pervading the entire body. The discussion went on; and the opponents now seem to be not the large and the small states, but the northern and southern states. There seems to have been a pretty general accord, at least for the time being, that wealth (as it would be the basis for assessing the public burdens) should be in some way recognized in representation—and that the legislature should, from time to time, regulate the representation according to population and wealth—though the word "wealth" was later abandoned in this connection. There is little in these discussions which concerns the question we are now examining—and it was not until the consideration of the report of the first committee was resumed, on July 14, that anything was said which requires especial notice. On that day, Mr. Gerry made the important suggestion that the states, while having an equal representation in the second branch, should vote *per capita*—to prevent the delays experienced in Congress, and to give "a national aspect and spirit to the management of business." The whole question of equality of representation in the second branch was again discussed, upon a motion by Mr. Pinckney, giving New Hampshire two votes, Massachusetts four, etc.—unequal but not proportionate representation. But the smaller states stood absolutely firm. Again they were deaf to the arguments of Mr. King, Mr. Madison, and others. Mr. King said that he considered the proposed government as substantially and formally a general and national government over the people of America. "There will never be a case in which it will act as a federal government on the states and not on the individual citizens." And Mr. Madison called "for a single instance in which the general government was not to operate on the people individually." There was an instance

given by Mr. Sherman, viz., in requiring quotas, but that was all—there was no reply—there could be none—to the arguments made. And it may well be doubted whether the Constitution would not have been greatly improved by a senate, in which there should have been at least a semblance of proportionate representation. Be this as it may, the small states stood firm, as I have said. And the report of the committee was agreed to, as amended, by a vote of five to four; Massachusetts divided, New York absent. The report provided, in substance, for a fixed number of representatives in the first branch, from the several states, varying from one from Rhode Island and Delaware to ten from Virginia; and gave the legislature authority to regulate representation upon the principle of the number of inhabitants—"provided always that representation ought to be proportioned according to direct taxation." A census within six years of the first meeting of the legislature, and once within every ten years thereafter was provided for, etc. Money bills were to originate in the first branch and were not to be altered or amended in the second branch—and in the second branch each state was to have an equal vote. The determined efforts of the small states to secure equality of suffrage in the second branch had been crowned with success, and this success was frankly stated by Mr. Randolph to be most embarrassing to him and the other advocates of the Virginia plan, as that plan had been worked out upon the theory of proportionate representation. Recognizing the necessity of some modification of this idea, at least as to the second branch, he had prepared a paper suggesting an equal vote on a number of important subjects, most of them involving the exercise of highly sovereign powers—indeed, there was hardly a power of this character omitted. But it was not submitted to the Convention, as an equal vote in all cases had been decided upon. He suggested an adjournment that the large states might consider what it was best to do "in the present solemn crisis of the business," a suggestion which seems to have been taken as a challenge by Mr. Patterson, which he instantly accepted, and proposed to adjourn *sine die*. But this proposition met with no favor—the great majority were really anxious that the Convention

should accomplish something, and voted to adjourn "until to-morrow." Before reconvening, an informal interchange of views seems to have convinced the members of the futility of further discussion of the subject, and the sixth resolution of the report of the Committee of the Whole came up for discussion. On the clause giving the general legislature power to negative all laws passed by the several states "in its opinion contravening the Articles of Union," etc., there was considerable debate, and signs were not wanting that the extremists were perhaps not so very far apart in their views. Mr. Gouverneur Morris, the most prominent centralist in the Convention, opposing the clause as "terrible to the states," and as giving the legislature a power properly exercisable by the judiciary; and Mr. Luther Martin, the great champion of state sovereignty, presenting a resolution that all laws passed by the general legislature within their proper sphere should be the supreme law of the respective states, whose judiciary should be bound by them, anything in the laws of the individual states to the contrary notwithstanding. The clause in the report was voted down decisively, and Mr. Martin's resolution was passed *nem. con.* The remaining resolutions in the plan were considered and debated, but for the present we must pass over the proceedings of the Convention until it comes to consider the question, To whom shall the new Constitution be referred for ratification? The nineteenth resolution provided for its reference to assemblies especially chosen by the people to consider it. Of course a motion was immediately forthcoming to refer it to the several legislatures, Mr. Ellsworth being the mover. Then ensued a debate which is most instructive in many ways. I do not propose now to notice it except when it concerns the particular question before us. The result of the debate was the passage of the nineteenth resolution by a vote of nine to one—Delaware, New York and New Jersey not voting. The motion of Mr. Ellsworth had been seconded by Mr. Patterson.

Mr. Mason at once took the floor in opposition. He contended that the legislatures had no power to ratify—the people must be appealed to "with whom all power remains that has not been given up in the Constitution derived from them."

He also argued that what one legislature did the next could undo—so that the general government would have a most unstable foundation. Mr. Ellsworth, in reply, differed with Mr. Mason as to both points—as to the first, because the legislatures had been considered competent to ratify the existing Articles of Confederation; and as to the second, he said, “An act to which the states, by their legislatures, make themselves parties, becomes a compact from which no one of the parties can recede of itself”; and it may be added that substantially this position had been taken many times before by the “small states” in an endeavor to prove that no number of states less than the whole could dissolve the existing confederacy. Mr. Morris pointed out that the fallacy of Mr. Ellsworth’s motion was its underlying idea that they were proceeding on the basis of the confederation. And Mr. Madison thought that as the proposed changes “would make essential inroads on the state constitutions” the legislatures were clearly incompetent to ratify them. The vital and essential difference between a system founded on the legislatures only and one founded on the people, was, that the one was a *league* or *treaty*, the other a *Constitution*. Morally they were perhaps equally inviolable. Politically, there were two important differences “in favor of the latter.” 1. “A law violating a treaty ratified by a pre-existing law might be respected by the judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves, would be considered by the judges as null and void.

2. “The doctrine laid down by the law of nations in the case of treaties is, that a breach of any one article by any of the parties frees the other parties from their engagements. In the case of a union of people under one constitution, the nature of the pact has always been understood to exclude such an interpretation.” Mr. Ellsworth’s motion was voted down, ayes 3 (Connecticut, Delaware, Maryland); noes 7. New York and New Jersey not voting. Mr. Morris thought the time opportune to move for one general convention of the people to ratify—but no one was prepared to go quite so far—the motion was not seconded. But the nineteenth resolution was passed as before noted. It was now moved by Mr.

Morris and Mr. King that the representatives in the second branch consist of—members from each state, who shall vote per capita.

Mr. Ellsworth said that he "had always approved of voting in that mode," and Mr. Williamson agreed with him. Mr. Martin of course did not, and expressly called attention to the fact that it was a departure from the idea of the *states* being represented in the second branch. Mr. Carroll did not object to it, but considered it a "material innovation." The blank in the resolution was filled with "two," and the resolution was thus passed. Maryland alone in the negative—New York and New Jersey not voting. The convention now took the important step of referring its proceedings to a committee to prepare and report a constitution "conformable thereto." The fact that the real conflict was between the North and the South was evidenced by a warning from General Pinckney that unless the southern states were secured against "emancipation, and taxes on exports," his duty to his state would force him to vote against the report. The committee—known as the Committee of Detail—was chosen by ballot, as follows: Mr. Rutledge, Mr. Randolph, Mr. Gorham, Mr. Ellsworth, Mr. Wilson. To it were referred the scheme submitted by Mr. Pinckney,—unfortunately lost to us—and the "New Jersey plan," as well as the "Virginia plan," after its passage by the Convention. In these resolutions as referred to the committee, the word "national" is used over and over again, in spite of the action of the Convention on the subject. The committee was appointed on July 24. On August 6,—one day less than two weeks later,—it made its report of a formal constitution. It consisted of a preamble and twenty-three articles. There had been no preamble in either the Virginia or the New Jersey plan—possibly there may have been in Mr. Pinckney's. The words of the preamble are: "We the people of the states of New Hampshire," etc., "do ordain, declare, and establish the following constitution for the government of ourselves and our posterity." The word "national" does not appear anywhere in the instrument. But it provides highly national and sovereign powers to be exercised by the general government, and especially mentions and defines "*Treason* against the

United States"—no such provision being in the Articles of Confederation, naturally enough. This crime is said to be "levying war against the United States *or any of them*." In the Constitution as adopted "any of them" is omitted. It also—in common with the Constitution provides that persons charged with "treason, felony or high misdemeanor in any state, who shall flee from justice," shall be returned to that state upon requisition. The whole report bears a very strong resemblance to the Constitution. It expressly denies to the states all the higher sovereign powers, some absolutely, some "without the consent of" Congress. The absolute denials in the Constitution are more numerous than in the report.

Next day the Convention, without debate and without dissent, agreed to the preamble and the first two articles (providing for the "style" of "the United States of America," and the three grand departments), and began their discussions upon the third article. There is nothing of present interest to us in these discussions until we come to the clause in Article IV, giving the House of Representatives the sole power of originating money bills; this was struck out as likely to cause trouble, and being of no especial use—some of the most pronounced nationalists taking this view. But the members were not by any means unanimous, although the vote was eight to one. The subject was again debated quite fully and warmly a few days later, and the same conclusion was reached. The clause, however, was afterwards restored. Not long afterwards the question as to whether the members of the national legislature should be paid by the states or by the general government was argued at some length, the decided majority favoring payment out of the "national treasury"—Mr. Martin made the point that, as the Senate represented states, it ought to be paid by them—to which Mr. Carroll answered that the senators were not intended to be the advocates of state interests, and ought not to be dependent upon the states. The vote was nine to two—but in spite of Mr. Martin, Maryland voted "aye"—and for some unknown reason, Massachusetts voted "no"; the other "no" being South Carolina. There is nothing especially noteworthy to record, until the Convention took up the question of national control of the militia. The desira-

bility of uniformity of discipline, etc., was generally recognized. But it was remarked by Mr. Ellsworth that it would never do to take the whole authority over the militia away from the states, "whose consequence would pine away to nothing, after such a sacrifice of power." After some discussion, the subject was referred to a recently appointed committee. A few days later the very important clause relating to "treason" was discussed. In the report of the committee of detail, it will be remembered, that this crime against the United States was defined to be "levying war against the United States *or any of them.*" Dr. Johnson, of Connecticut, insisted that there could not be "treason" against the United States, *or* individual states. It was an offence against the sovereign, and in one community there could be but one sovereign. This was so plainly true, that it is remarkable that it should have failed of clear recognition. Dr. Johnson continued by saying that there could be no treason against a particular state, even under the confederation, "the sovereignty being in the union"—which it was not—"much less can it be under the proposed system." To this Colonel Mason answered that the United States would have a "qualified sovereignty" only. "The individual states will retain a part of their sovereignty, an act may be treason against a particular state, which is not so against the United States," and he instanced Bacon's rebellion in Virginia. To which Dr. Johnson replied that that would have been treason against the United States. Mr. King thought the question not so important, after all; the legislature might punish capitally under other names than treason. He moved to insert "sole" before "power," giving the United States the exclusive right to declare the punishment for treason. Mr. Wilson thought that in "cases of a general nature" treason could only be against the United States, "yet in many cases it might be otherwise." Mr. King insisted that there could be no line drawn, adhering to an enemy of an individual state was adhering to an enemy of the United States, which drew from Mr. Sherman the remark that the line lay between the resistance to the laws of the United States and to those of a particular state, entirely missing the point, for merely "resisting" the laws is not treason,

unless, of course, it takes the form of a revolutionary movement. Mr. Ellsworth expressed the idea a little better when he said that the United States were "sovereign on one side of the line dividing the jurisdiction—the states on the other. Each ought to have power to defend their respective sovereignties." Mr. King's motion was lost by one vote, and then the whole clause was reconsidered and amended to read, "Treason against the United States shall consist only in levying war against them," etc.

There was a great deal of confusion apparent in the minds of the members during the debate, occasioned by the failure to recognize the clear proposition of Dr. Johnson, viz., that there can be but one really sovereign power in the community, and that "treason" is an offence against it. The practical wisdom of allowing a state to punish any one who should seek to overturn and seize upon its government may be at once conceded; there could be no object in depriving it of this power. But it is a confusion in terms to call this "treason" against a particular state, if there is to be such a thing as, "treason against the United States." And if there was one thing certain and agreed upon on all sides, it was that there *should* be a provision in the new Constitution upon that very subject; there never was a word to indicate that owing to the provisions for "treason" against the states individually, in their several constitutions, it would be better, after all, for consistency's sake, not to mention or define such a thing as "treason" against the *United States*; on the contrary, the narrow margin of one vote prevented the United States from having the *sole power* to punish that particular crime; and, as far as can be gathered, the real reason for a failure to make a logical provision on the subject, *i. e.*, one which would have left out all reference to the states as such with regard to it, was, as suggested above, the fear that the states would be deprived of the power of self-defence against attacks upon their governments, which could easily have been provided for under another and truer name—insurrection, riot, etc., if by force, conspiracy (for nobody would "go it alone," in such a case) if without force.

When they came to the question of taxation, Mr. Luther

Martin characteristically moved that the legislature (*i. e.*, Congress) should make requisitions upon the states for their respective quotas and only pass laws for imposing and collecting taxes upon the failure of a state to comply with the requisition. There was no debate and the motion was promptly defeated by a vote of eight to one—New Jersey. Mr. Martin's own state was divided.

A few days later, Mr. Pinckney again introduced the question of giving the national legislature a power to negative all laws passed by the several states, which, in their opinion, interfered with the general interests or harmony of the Union. It had already been provided that the Constitution and laws made in pursuance of it should be the supreme law of the land, and the proposition was rather a bold one in view of all that had passed. It again found support, however, from some of the best men in the convention, though Mr. Rutledge said that it alone would damn, and ought to damn the Constitution—it would bind the states hand and foot. Mr. Ellsworth remarked that it might as well be provided that the state executives should be appointed by the general government, and have control over the state laws. To which Mr. Pinckney retorted that that was exactly what ought to be done, and what he thought would be done, if another convention were called—a very extreme position and one which was no doubt rather in advance of his real views; in the heat of controversy in the Constitutional Convention, decorous body though it was, men were apt now and then to say more than they would afterwards have subscribed to. The giving to the national legislature a revisionary power over the acts of the state legislature would have been a grievous error—and its support by some of the very best and ablest men in the Convention can only be accounted for by the ever-present fear in their minds of disruptive tendencies on the part of the states. It was too much for even so ardent a nationalist as Mr. Gouverneur Morris, who said that he did not see the utility or practicability of the proposition. From this point onward, oddly enough, there is nothing in the debates, highly interesting as they are, which calls for especial comment now. And we have therefore completed, practically, one line of investigation. The debates

have been carefully gone over, and we are now ready to decide—not what was meant by the Constitution—but *what its framers judged by their own words and actions while framing it*, understood it to be. It seems clear enough, that it was thought on all hands to be a radical departure from the Articles of Confederation—and that it was intended to be so, and was for that very reason unacceptable to some of the members. It must be equally clear, I think, that there was no intention on the part of the Convention to abolish the states as such, or to reduce them quite to the situation of “mere corporations.” But while preserving them as inviolable local autonomies, with certain powers beyond the reach of Congress or the general government—and giving them as collectivities an equal representation in the Senate, the Constitution as proposed, and adopted, expressly denuded them of all the higher and really sovereign powers. I believe, of course, that the Constitution was the result of numerous compromises, as to a good many parts of it, at least. And the marvel is that the balance was so nicely kept. But the general thought of the Virginia plan underlies it, and that a great majority of its members thought they were framing and intended to frame a general or national government, as contradistinguished from a confederacy or league there can be no doubt. Of course, I speak now only of the conclusion to be reached from the proceedings of the Constitutional Convention.

We shall see whether other evidence confirms or disproves this conclusion.

Lucius S. Landreth.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

BANKRUPTCY.

In Pennsylvania a landlord has no lien for rent on the proceeds of the sale of his tenant's leasehold when it is sold on Landlord's execution, and such a lien is not to be implied from a mere right to re-enter for breach of a condition of the lease. Therefore the District Court (W. D. Penna.) decided that where the tenant's leasehold is sold by the trustee in bankruptcy under such circumstances, the landlord is not a preferred creditor to the extent of his overdue rent: In *Re Ruppel*, 97 Fed. 778.

In *In Re Higgins*, 97 Fed. 775, an action against the bankrupt had been commenced two years before the bankruptcy, but within four months previous to the filing of the petition an attachment was made in the same action, upon which judgment was obtained. The District Court (D. Ky.) held that this was an attachment within four months previous to the filing of the petition within § 67 c of the act, since, in effect, the attachment was a new proceeding and not merely a continuation of the original suit.

BANKS AND BANKING.

Contrary to the rule adopted in Pennsylvania and most states, the Supreme Court of Nebraska affirms the following as the law of Nebraska: "A check drawn on funds in a bank is an appropriation of the amount of the check in favor of the holder thereof,—in effect, an assignment of the amount of the check,—and the holder, upon refusal of the bank to pay the same, where such funds have not been drawn out before its presentation, may bring an action thereon in his own name": *Henderson v. U. S. National Bank*, 80 N. W. 898. But in this case the court refused to apply the rule, holding that the fact that the check was for an amount greater than the deposit, prevented it from operating as an assignment. From a logical standpoint it is hard to see how this fact makes any difference, and it would seem that the case of *Bromley v. Bank*, 9 Phila. 522,

BANKS AND BANKING (Continued).

cited with disapproval by the Nebraska Court, reaches a more reasonable conclusion on this point, although the premise upon which the latter case is based is clearly in opposition to the current Pennsylvania law.

The Supreme Court of New Jersey has given a reasonable construction to the terms of withdrawal contained in a savings bank book, although in doing so it was necessary to do violence to certain express words. The **Terms of Deposit in Savings Bank, Construction** terms of withdrawal were: "Deposits and dividends shall be drawn out only by the depositors in person, or by their written order, or by some person legally authorized, and only upon the production of the depositor's book, that such payments may be entered therein, and all payments to persons who present the deposit book shall be valid payments to discharge the bank and its officers." In *Cosgrove v. Provident Inst.*, 44 Atl. 936, it was held that the last clause of the agreement did not operate to create a separate class of persons entitled to withdraw, but only added an additional qualification to the other three classes, viz., the necessity to produce the deposit book; therefore a payment to a stranger, who presented the book and represented himself as the depositor, did not discharge the bank.

BILLS AND NOTES.

In *Murphy v. Improvement Co.*, 97 Fed. 722, the Circuit Court (W. D., Ark.) decided (1) that a note "to A. or assignee" **Negotiability, Set-Off** is negotiable; (2) that it remains negotiable in the hands of a holder, even though the payee has indorsed it to the holder, "Pay to B." without further words of negotiability; and (3) that the defence of set-off between the original parties is not such an equity as will effect a holder for value, even though he takes with knowledge.

CARRIERS.

It seems that a passenger on a sleeping-car has a right to assume that the centre aisle is unobstructed. In *Levien v. Webb*, **Sleeping-Car Company, Obstructed Car** 61 N. Y. Suppl. 1113, the passenger, in walking up the aisle, which was dimly lighted, stumbled over a valise which had been left in the aisle with the knowledge of the defendant's porter. The Supreme Court of New York decided that the questions of the defendant's negligence and the plaintiff's contributory negligence were properly left to the jury.

CONSTITUTIONAL LAW.

In view of the violent opposition to the federal courts which has lately arisen, the question has been mooted whether or not Congress could constitutionally abolish them altogether. On this point *State v. Lindsay*, 53 S. W. 950, is interesting since it construes a clause of the constitution of Tennessee, which is similar to the one in the Federal Constitution, viz. (Const. Tenn. Art. 2, § 2) "The judicial power of this state shall be vested in one supreme court and in such circuit, chancery, and other inferior courts as the legislature shall from time to time ordain and establish." Under this section the Supreme Court of Tennessee (Snodgrass, C. J., and Beard, J., dissenting), held that the legislature had power to abolish the existing Court of Chancery and to confer its powers and jurisdiction upon other courts.

Whatever may be the constitutionality of general laws framed to protect workmen against unjust exactions by their employers, it is clear that such laws must be general in their operation. Thus the Court of Appeals of Maryland very properly held that the fourteenth amendment was violated by the Maryland statute (1898, C. 493), which applied only to railway and mining corporations, forbidding the officers of such corporations from being interested in company stores: *Luman v. Hitchen Bros.* 44 Atl. 1051.

CORPORATIONS

The generally prevailing rule that a stockholder in an insolvent corporation cannot set off an indebtedness of the corporation to him in an action by the assignee to recover the unpaid balance of his stock, does not apply when the action is brought against a mere debtor of the corporation. The Court of Appeals of Maryland in *Colton v. Dover Loan Association*, 45 Atl. 23, accordingly decided that the maker of a note, held by an insolvent bank, could, in an action on the note by the assignee, set off his deposit in the bank to the limit, even though by so doing he gained an advantage over the other depositors, who received merely small percentages.

"The Supreme Court of the United States has declared the law. We can but follow and obey." Such was the unwilling adoption by the Circuit Court of Appeals (Seventh Circuit) of the doctrine favored by the Supreme Court of the United States, that a corporation, when sued on its guarantee, is not estopped from pleading its lack of power

Power of
Legislature
to Abolish
Courts

Police
Regulation
Aimed at Class

Set off by
Depositor in
Insolvent
Bank

Ultra Vires,
Estoppel

CORPORATIONS (Continued).

to make the guarantee by reason of its receipt of the benefits of the transaction: *Cent. Trust Co. v. I. & L. M. R. Co.*, 98 Fed. 666.

COURTS.

Revised Statutes (U. S.), § 4966, provides that the proprietor of a dramatic composition, upon which a copyright has been **Jurisdiction,** issued, may recover a certain sum for each **Penal Actions** performance from any person giving public performances without the consent of the proprietor. In *Brady v. Daly*, 20 Sup. Ct. 63, the Supreme Court of the United States decided that an action brought under this statute was not an action for a penalty, but merely for damages; therefore the jurisdiction of the District Court of the United States was not exclusive, and the action could be brought in the Circuit Court.

Another case on this subject is *Slicktenoth v. Grain Exchange*, 99 Fed. 1, where an action was brought by a disinterested person under the Illinois act of 1885 (p. 792, c. 38, § 132), providing that when money is lost by gambling, and no action to recover it back is brought by the loser, any person may bring an action against the winner to recover treble its value, half of the amount recovered going to the county. The Circuit Court (N. D. Ill.) refused to assume jurisdiction, on the ground that the remedy given amounts to a *qui tam* action and is therefore penal.

In *Hassard v. United States of Mexico*, 61 N. Y. Suppl. 939, the plaintiff, having a claim against Mexico, attached goods **Suit Against** of the Mexican government in New York. As a **Foreign State** matter of course the suit was dismissed on the ground that the state court had no jurisdiction of an action against a foreign state, but it is interesting to observe that the dismissal was made upon the motion of the United States District Attorney for New York, who had no interest in the case, officially or otherwise, but who appeared merely as an *amicus curiæ*.

CRIMINAL LAW.

The celebrated cigarette agitation in Tennessee appears to continue in full force. Subsequent to the act of 1897, prohibiting the sale of cigarettes within the state, the Legislature passed an act (1899, C. 30, § 1), enumerating certain vocations which might be carried on only with a license, and providing for a license

**Repeal of
Prohibitory
Statute by
Implication**

CRIMINAL LAW (Continued).

fee for the sale of cigarettes. The Supreme Court of Tennessee held that the latter act did not repeal by implication the act of 1897 so as to authorize the sale of cigarettes: *Blaufeld v. State*, 53 S. W. 1090. The court also affirmed its ruling that cigarettes are not the subject of commerce within the commerce clause of the Constitution of the United States.

Where a statute defines the crime of rape as sexual intercourse accomplished with a female "not the wife of the perpetrator," it is essential that the indictment should aver that the prosecutrix is not the wife of the defendant, and its failure to contain such an averment will render it demurrable: *Parker v. Territory*, 59 Pac. (Okla.) 9. But this rule is not applicable under the common law or in states where the statute does not contain the above provision.

DAMAGES.

Burgoon v. Johnston, 45 Atl. 65, is interesting in showing how far a court will consider the status of the parties to a contract in determining whether or not a stipulation amounts to a penalty or merely a liquidation of damages. It appeared that the defendant, who was a physician, went to the plaintiff, a specialist on skin diseases, to be treated for a sore on the face. The plaintiff required that the defendant should, in case of a cure, either give him a certificate of proficiency or \$5,000; to which the defendant assented. The Supreme Court of Pennsylvania, taking into consideration the fact that the defendant was a physician himself, and therefore probably familiar with the proper amounts for charges, decided that the \$5,000 was liquidated damages, and not a penalty for the failure to give a certificate, and it could, therefore, be recovered as compensation for the cure.

In *Auchincloss v. Manhattan Rwy. Co.*, 60 N. Y. Suppl. 792, which was a proceeding to recover damages for injury to plaintiff's land by reason of the erection of an elevated railway upon the street in front of the property, a rather novel method of assessing the damages was unsuccessfully brought forward by the plaintiff. Instead of claiming the difference between the values of his land, without and with the railway, he sought to establish as the basis of his damages the sum his property would have been worth if the railway had been built through the neighborhood, but not directly in front of his

Rape,
Indictment

Liquidated
Damages,
Position of
Parties

Eminent
Domain,
Benefit from
Railway

DAMAGES (Continued).

property. The Supreme Court of New York, however, frustrated this ingenious attempt to utilize the rise in values attending the construction of the railroad through the neighborhood.

In an action for injury to the plaintiff's hand, the only evidence of permanent injury introduced by the plaintiff was the **Future Pain from Injury, Evidence** exhibition of the hand and his own testimony that he occasionally had pain when he used the hand. The trial judge charged: "You may award an amount which should reasonably compensate the plaintiff for the pain and suffering such as you are prepared to say he will endure in the future within reasonable probability." *Held*, error, by the Supreme Court of New York, on the ground that no sufficient evidence had been submitted to the jury to enable them to estimate whether or not there would be any future pain, or what its duration would be: *Webb v. Union Rwy. Co.*, 60 N. Y. Supl. 1087.

EVIDENCE.

In *Patterson v. Kennedy*, 81 N. W. 91, an action was brought on a judgment obtained in Ontario. The defendant having **Proof of Foreign Practice** contested the validity of the judgment on account of lack of service by the Canadian court, it was shown that the summons in the Ontario suit was served by a minor of the age of nineteen years. The plaintiff called a Canadian barrister, who testified that such a service was good under the Canadian practice, but no statute or decision of a Canadian court to this effect was produced. The Supreme Court of Minnesota decided that the service of a legal summons had been sufficiently proved, but from the authorities cited it would seem that there is some conflict upon this point.

HUSBAND AND WIFE.

A statute of Minnesota (Gen. St. 1894, § 4769) provides that "every male person who has attained the full age of **Prohibition of Marriage Under Age, Effect on Validity of Marriage** eighteen years and every female who has attained the age of fifteen years, is capable in law of contracting marriage if otherwise competent." Other sections impose liabilities upon clergymen and officers solemnizing the marriage of persons under those ages. In *State, ex rel. v. Lowell*, 80 N. W. 877, the Supreme Court of Minnesota decided that the above statute did not by implication render void the marriage of persons under the prescribed ages, therefore the father of a girl of thirteen who had been married, had no right to restrain her from living with her husband.

HUSBAND AND WIFE (Continued).

In Maine the common law rule prevails that a wife cannot sue her husband. In *Weeks v. Elliott*, 45 Atl. 29, the question was raised whether or not this rule prevented a wife from proving a claim, on a note given to her by her husband, against the assigned estate of the husband. The Supreme Court of Maine decided that, since the contract was a valid one, the mere fact that the wife was unable to enforce it by suit did not prevent her proving against the estate, since the reasons which caused the law to forbid suits between husband and wife did not apply to an action, not against the husband, but against his estate.

That the common law rules of evidence in civil actions do not apply to cases of divorce tried by a judge is shown by *Warner v. Warner*, 44 Atl. 908. Here the Supreme Court of Maine decided that the general reputation of the respondent, accused of adultery, for virtue and chastity was admissible, although such evidence could not be received in a civil action at common law.

INSURANCE.

In *Jones v. German Insurance Co.*, 81 N. W. 188, the Supreme Court of Iowa holds that where an insurance policy, by its terms, expires at "12 o'clock noon," the presumption is that it expires at 12 o'clock, solar time, and the burden is upon the party alleging that standard, or railroad time is intended, to show such a general use of standard time at the place of the execution of the policy as will warrant the court in assuming that the parties intend that standard time shall prevail.

In *Kelly v. Cath. Mut. Ben. Asso.*, 61 N. Y. Suppl. 394, the by-laws of the defendant, a mutual benefit association, provided that no life insurance should be paid without proof of actual death of the insured. In this case the insured had disappeared for over seven years, and the beneficiary contended that it was contrary to public policy and to the object and purpose of the association to require a greater evidence of death than that recognized by law. However, the Supreme Court of New York decided that there was nothing to prevent the association from requiring any particular form of proof that it chose, and that the beneficiary could not recover.

LIENS.

The common law rule, that the lien of a stable keeper upon horses for their keep is lost by surrender of possession, is still strictly enforced. Thus in *Darling v. Hunt*, 61 N. Y. Suppl. 278, the livery stable keeper accepted from the owner of the horse a chattel mortgage of the horse in payment of its keep, and allowed the owner to retain possession of the horse during the period of the mortgage. *Held*, that the keeper had lost his lien.

MASTER AND SERVANT.

The Supreme Court of the United States has finally overruled its decision in *Chicago, etc., Ry. Co. v. Ross*, 112 U. S. 377, in which it decided that a conductor of a railroad train was not a fellow servant of the engineer, but that the railroad was liable, in an action by the engineer, for the negligence of the conductor. After explaining, distinguishing and qualifying the decision for a number of years, the Supreme Court finally overruled it flatly, and in *New England R. R. Co. v. Conroy*, 20 Sup. Ct. 85, decided that a brakeman was a fellow servant of the conductor of the train. Harlan, J., dissented, adhering to the rule laid down in *R. R. v. Ross*.

NEGLIGENCE.

In *Montgomery v. Ladjing*, 61 N. Y. Suppl. 840, Freedman, J., gives an excellent discussion regarding the liability of restaurant keepers for articles lost by their guests. Following the weight of authority, he decided that the restaurant keeper does not occupy the position of an innkeeper, or even of a bailee, unless the custody of the articles is given to his servants; therefore where a man on entering a restaurant hung his overcoat on a hook near him, from which it was stolen while he was dining, it was held that he could not recover from the restaurant keeper in the absence of proof of negligence by the latter.

PRINCIPAL AND AGENT.

In *Kierstead v. Bennett*, 45 Atl. 42, suit was brought against the maker of the following promissory note: "I, in my official capacity as treasurer of the Danforth Trotting Park Association, promise to pay, etc. . . . [signed] Horace A. Bennett, Treas." The Supreme Court of Maine, intimated that this was a personal undertaking of Bennett to pay the amount, but it was unnecessary to decide the question, since the association was unincorporated.

QUASI CONTRACTS.

The Supreme Court of Michigan holds that the plaintiff may waive a tort and sue in assumpsit only (1) where the defendant has converted property of the plaintiff or (2) where the defendant holds property of the plaintiff by virtue of contract relations with the plaintiff. In *St. John v. Iron Co.*, 80 N. W. (Mich.) 998, it was therefore held that where a third had converted the plaintiff's property and had sold it to the defendant, the plaintiff could not sue the defendant in assumpsit, but was relegated to his action of trover. There does not seem to be much reason for this very fine distinction in regard to the waiver of tort, and the case would probably not be followed in all jurisdictions.

REAL PROPERTY.

In *Smith v. James*, 54 S. W. 41, the Court of Civil Appeals of Texas held that the rule that possession under an unrecorded deed is constructive notice of the grantee's title, was not varied by the fact that, previous to the deed, the grantee had occupied the premises as a tenant of the grantor, and there was consequently no change of possession under the deed.

SURETYSHIP.

Where a surety on a written instrument agrees in writing to ratify all "extensions" of time of payment and to be responsible as if no extension had been allowed, such an agreement covers only actual extensions resting upon positive agreements between the creditor and the debtor, and it does not render the surety liable on an extension of time implied from the fact that the creditor receives interest from the debtor subsequent to the maturity of the instrument: *Bank v. Thomson*, 59 Pac. (Kas.) 178.

TRIAL.

It is generally held that it is within the discretion of the trial court in cases of personal injury to order the plaintiff to submit to a physical examination by the defendant's physicians. In *Wittenberg v. Ousgard*, 81 N. W. 14, the defendant demanded that the plaintiff should allow the region of his injury to be photographed by means of the Roentgen rays. The Supreme Court of Minnesota held that the lower court had properly exercised its discretion in refusing the application, since the Roentgen rays have not become so thoroughly recognized by science that a court can take judicial notice of the fact that they can be employed without injury to the subject.

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CONTRACT WITH MUNICIPAL CORPORATION, COST OF WORK INCREASED BY ACT OF MUNICIPALITY.—In the case of *Horgan v. Mayor*, etc., 55 N. E. Rep. 204, 206, 1899, citing *Messenger v. City of Buffalo*, 21 N. Y. 196, 1860, and *Mulholland v. Mayor*, etc., 113 N. Y. 631, 1889, the facts were as follows:

"The plaintiff . . . entered into a contract in writing with the city of New York to furnish . . . all the necessary materials and labor, and excavate, remove and dispose of all silt, sediment and other materials deposited in the bottom of the pond . . . and construct a concrete bottom over same. . . . Plaintiff seeks to recover in this action for extra work under the contract. . . .

"The sheet of water known as the 'Pond' is a small lake in Central Park. . . . The pond had an outlet consisting of a cir-

cular gate twenty inches in diameter, resting on the bottom, and connecting by pipe with one of the city sewers. There was also an overflow basin about twenty-five feet from the gate, and five or six feet higher, which also led to one of the city's sewers. . . . Subdivision 1 [of the contract] provides that plaintiff shall furnish 'all labor and materials required for conducting the flow and draining off the water from the bottom during the prosecution of the work.' Subdivision 2 states that plaintiff shall furnish 'all labor and materials required for conducting the flow of water thro' or across the area of the pond, or any portion thereof, and all pumping or bailing or other work required.' Subdivision 5 requires plaintiff to provide 'all labor and materials required for conducting the flow of water thro' or across the area of the pond to the outlet, or for draining water from any portion of the area, and all pumping or bailing required for the proper prosecution of the work during its progress and until its completion.' Subdivision 33 reads as follows: 'all loss or damage arising out of the nature of the work to be done under this agreement, or *from any unforeseen obstruction or difficulties* which may be encountered in the prosecution of the same, or from the action of the elements, or from incumbrances on the line of the work, or from any act or omission on the part of the contractor or any person or agent employed by him, not authorized by this agreement, shall be sustained by the said contractor.' In the blank form of proposals for estimates under which the plaintiff made his bid is this provision: 'Bidders must satisfy themselves by personal examination of the location of the proposed work, and by such other means as they may prefer, as to the accuracy of the . . . estimate, and shall not at any time after the submission of an estimate dispute or complain of such statement . . . , nor assert that there was any misunderstanding in regard to the nature or amount of the work to be done.' . . . It was proved at the trial that the plaintiff made the personal examination of the location of the proposed work as required. Shortly after the contract was executed the plaintiff requested the proper city authorities to draw off the water from the pond, and thereupon the circular gate, twenty inches in diameter . . . as already described, was opened, and the water was drawn down to a depth of fourteen inches, when the outlet-pipe ceased to work. An examination disclosed that the pipe or sewer was very seriously obstructed and unless the same was cleared out no further water could be drawn from the pond." . . .

Bartlett, J. in delivering the opinion of the court said "The question that lies at the threshold of this case is, did the city owe the duty to the plaintiff of having the outlet pipe of this pond in working order? . . .

Without answering this question or further considering the point raised, he proceeds: "A fair construction of the contract on this point authorized the contractor to assume that the pond could be drained of water, in a general sense. . . . The contract did not contemplate the contractor pumping out the water of the lake, in a general sense. . . . It was proper for plaintiff to assume that the water of the lake could be discharged into the sewer thro' the outlet

the city had constructed for that purpose. This construction of the contract falls within the familiar rule: 'The meaning of a contract is to be gathered from a consideration of all its provisions, and the influences naturally derivable therefrom, as to the intent and object of the parties in making it and the result which they intended to accomplish by its performance.'"

"The additional point is taken on behalf of the city that, even if the contract should be construed as we have indicated, nevertheless the plaintiff has waived all claim for extra work by reason of subdivision 33 of the specifications." [see above.]

"When this provision is reasonably construed, it does not operate against the plaintiff as contended. It must be held to apply to the work to be done, and the unforeseen obstructions or difficulties which may be encountered *under the agreement*. The unforeseen obstruction that was encountered, and that subjected this plaintiff to a large amount of extra work, was entirely *outside the contract*, and stands unaffected by this provision."

If such an occurrence as this is "outside the contract," we should like to know what things can be included in a contract. Surely, the language of Sec. 33 is comprehensive enough to include this. In a sense, the stopping up of a drain was not a contingency provided for by the terms of the contract, because it was not expressly mentioned. But it would seem, in another and more obvious sense, to be within the contract, as it is expressly stipulated that "all losses . . . arising . . . from any unforeseen obstruction or difficulties . . . shall be sustained by said contractor." We are unable to follow the logic of the learned judge to the effect that the saving clause does not apply because the contractor, in assuming an obligation to cover the bottom of the pond with concrete and impliedly also to dispose of all the water in the pond, did not consider that the normal method of draining it off might fail. In other words, it is incomprehensible that a man can declare his liability for the consequences of an unforeseen contingency and then, when the contingency occurs, seek discharge because he did not foresee it.

Apropos of this, we would invite attention to a recent utterance of the Supreme Court of the United States. ". . . It may be well, to briefly recall certain well-settled rules in this branch of the law. One is that if a party by his contract charge himself with an obligation possible to be performed, he must make it good unless his performance is rendered impossible by the act of God, the law, or the other party. *Difficulties, even if unforeseen*, and however great will not excuse him. If parties have made no provision for a dispensation, the rule of law gives none, nor, in such circumstances, can equity interpose." Shiras, J., in *United States v. Gleason*, Oct. 1899 (not yet reported).

It only remains to add that the decision of *Horgan v. the Mayor* was rendered by a divided court and overruled both decisions in the lower courts.

Compare this case with *Fresno Milling Co. v. Fresno Canal Co.*, 59 Pac. 141, digested in A. L. R. for March, 1900, at p. 177.

BOOK REVIEW.

DEED FORMS ANNOTATED. BY EMERSON E. BALLARD. Logansport, Ind.: The Ballard Publishing Company. 1900.

Accuracy in the conveyance of real estate affects alike the investment of the capitalist, the security of the money lender and the home of the humblest land owner. Interests of such magnitude and diversity afford a sufficient reason for the publication of a modern book designed to furnish lawyers, bankers, abstracters, conveyancers, real estate dealers and land owners, in a convenient form, accurate information as to the formal requisites of a deed to land in all parts of the United States.

Mr. Ballard's work contains a special treatise upon the formal requisites of deeds as prescribed by the statutes of the various states and territories. The states are alphabetically arranged, each forming a separate division in the book, under which are set forth, with proper section heads, their respective statutory provisions concerning the requisites of a deed to land, to which are added the prescribed forms of warranty deed, quitclaim deed, and such other special forms of deeds as are provided for by statute. These forms are followed by the statutory provisions as to who may take acknowledgments and the prescribed form of the officer's certificate of acknowledgment. In all those states or territories where the forms of deeds or certificates of acknowledgments are prescribed by statute, these provisions are all carefully set forth in the exact language of the statute with a proper reference to it, and in such cases no other forms are given; but if there is no statutory provision as to any essential form that fact is stated and a copy of a form in general use is set forth in the same manner as the statutory forms.

Questions as to the formal sufficiency of deeds so frequently arises in connection with the preparation or examination of abstracts of title that the author has supplemented his work on "Deed Forms" with an Appendix containing a concise but exhaustive treatise on the Law of Abstracts and Abstracters, in which, under appropriate section heads, are epitomized and arranged all the important cases deciding any principle of law concerning the definition, contents, necessity, ownership or use of an abstract, or the duties, rights and liabilities of persons who prepare or examine abstracts. At the close of the article, all the statutory provisions of the several states and territories concerning any phase of this subject are carefully compiled and arranged by states, important information which has not hitherto been made accessible to those interested in this subject in any convenient form. The Appendix also contains the provisions of the Internal Revenue Act of June 13, 1898, concerning the stamping of conveyances and the rulings and decisions construing them.

Mr. Ballard's volume is well calculated to meet the varying exigencies peculiar to real estate law, and we recommend it to all engaged in conveyancing.

P. C.

BOOKS RECEIVED.

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By SEYMOUR THOMPSON, LL.D. San Francisco: Bancroft-Whitney
Co. 1899.

GREENLEAF'S TREATISE ON THE LAW OF EVIDENCE. Vol. I. Edited
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CARLOS C. ALDEN. New York: Baker, Voorhis & Co. 1899.

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***LEGALIZED WRONG.** By ROBERT C. CHAPMAN. Chicago, New York
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*An Address Delivered Before the New York University, on the Occasion
of the Graduation of the Woman's Law Class, March 29, 1900.*

HAS THE STUDY OF LAW A PLACE IN A LIBERAL EDUCATION.

A few years ago a Hindoo woman of high caste came to one of our leading universities. When asked what she wished to study she looked puzzled. "I come for an education," she said. With some difficulty she was made to understand that "education" did not necessarily mean information on a definite series of subjects, and that two persons might both be well educated and yet know different things. The mental attitude of the Hindoo woman was not essentially different from the attitude of our own colleges fifty years ago. From the point of view of the college professor of 1850, a well-educated man was one who knew a certain amount of mathematics—not too much—and had acquired some knowledge of the classics. Even this conception was narrowed by the fact that "knowledge of the classics" did not imply an ability to read or converse in Latin or Greek, but an ability to quote from a few of the best known Greek and Latin authors. However much a man might know, if he had not read his

Anabasis, his Cæsar and his Horace, he was not well educated. As for the women, they were not educated at all. After they had acquired a knowledge of the three R's they were "finished" with dancing and a jargon which their parents believed to be and paid for as Parisian French.

If to have definite ideas is an advantage, our predecessors undoubtedly had that advantage. When they spoke of education, or of a well-educated person, they knew exactly what they meant. The chancellors, the provosts, and the presidents of those days were not troubled with such questions as the function of the university; the objects of education; or the objections to coeducation. No one thought of questioning the sphere of the college, the course to be pursued, or that the higher institutions of learning should exist only for men. The accepted ideas or rather axioms on these subjects had been undisputed by many generations of patient pedagogues. On the other hand, whatever superiorities the modern university may possess, certainly among them is not to be found a definite conception of the purpose of education, or of the place of the university in the community. About all we are agreed on is, that the university is more than a storehouse for classic lore, and that the old idea that a well-educated person is one who knows certain definite subjects is untenable. Few, however, of those connected with universities would be so bold as to give, off-hand, a definition of a well-educated man or woman, while it would be perhaps difficult to find two persons who could agree, even after consideration, on exactly the same definition.

It is therefore with considerable misgiving that I make any suggestions in regard to what should be considered necessary to constitute a well-educated person; and the function of a university as an educational institution. I should not have the boldness to express my own ideas on these subjects, if I were not obliged to do so in order to make clear my attitude towards the question which I have set myself to answer.

Suppose we have before us a young child whom we desire to educate, or better, whom we desire to help educate itself. There are at least four classes of things that we can do. We can increase the child's store of facts and ideas; we can

assist the development of its sense of perception ; we can surround the child with influences which will tend to mold into its being traits of character ; or we can train the brain to grapple with intellectual problems, and the hand with physical ones. These things are not mutually exclusive. While we are training the sense perceptions we can also increase the child's store of facts, affect the character, train the brain and hand. Indeed, if we confine ourselves to one class of effort one may well ask : can we produce the well-educated man or woman ? Take one who has a large stock of facts but nothing more ; one, for instance, who knows the facts of history, but cannot use his knowledge to throw light on a single question of race development ; one who knows the population of each of the great cities of the world, and has statistics of trade commerce at his finger ends, but cannot think intelligently on any municipal or commercial question ; one who knows all about music, but cannot enjoy it. I think we would all agree that such a person is not well educated. Let us take another example, where the educational effort has been in another direction. I know a man who can appreciate natural beauty and good literature ; who can enjoy good music and good painting. He is not an author, he has not any thought-out opinions, on art or literature, and can neither play nor draw. In fact, he does nothing and his thoughts amount to nothing. You have all met my friend or his counterpart. Do you consider him a well-educated person ? Again, we may take another example, of a different kind of onesidedness. A few years ago a certain pedagogical freak started a school for boys. There were no regular studies. A parent who had sent his son to this school for three years thus described the result : "The boy is honest and truthful and has lots of intellectual curiosity, but he has learned nothing." What he meant was that his son had no connected ideas or facts in his mind. The school has ceased to exist. Personally I do not regret this fact. The teacher might have done worse and have been less blamed, but I do not think he was educating those under his care. A consideration of such examples as these will perhaps lead most of us to agree, that if we confine ourselves to one of the classes of educational

effort which I have mentioned we cannot produce a well-educated person in any proper sense of the term, and that to be well educated we must at least have a knowledge of facts, a power to enjoy the beautiful in some form or other, and a certain desire for knowledge, with a certain ability to grapple intellectually with some class of problems.

Suppose we agree on the necessity for development along all four of the lines mentioned, the next question I want to suggest to you is this: If you find one so developed have you necessarily found a well-educated person? Let us test the answer to this question by two examples. I understand that not long ago there was at a university a widely known astronomer. He knew many facts about the heavens and had solved more than one disputed point in relation to the character of heavenly bodies, his senses were keenly alive to their beauty and he had a thirst for knowledge, but his letters were always carefully corrected by his secretary, because, otherwise they might not have been free from faults of grammar, and would certainly have been full of errors in spelling. That he was a learned man none doubted. Many called him uneducated.

Turning from the extraordinary, let us take a case, not essentially different, but so common in the world of universities that most of us have doubtless met more than one example: the man who knows one thing thoroughly but nothing of the life going on around him; the man learned in Assyrian but ignorant of the history of his own state, or the political questions of his time; the learned scientist to whom all literature is a sealed book; or the authority on Greek roots who cannot tell a dynamo from a steam engine. What makes us hesitate, while admitting the learning of such men, to call them well educated? They know many facts, have sense perception, ideas, and ability to cope with one class of problems at least. They can do something. Is it not that in our conception of good education, there is the idea of a certain range in the facts known, in ideas, and even in intellectual ability? The specialist may be a learned man and a useful man, but if he is a specialist and nothing more we may doubt his title to be called well educated, and though it is one of the

objects of our universities to produce specialists, if they produce specialists and nothing else they are not fulfilling their function in our educational system.

Education, therefore, contains the idea of breadth as well as the idea of a simultaneous development of knowledge sense perception and power. Having arrived thus far we may again ask ourselves: Is there any other element necessary to the definition? Must we know any particular set of facts, or must we develop the power of enjoyment in any particular direction; must we have any particular individual or moral qualities, in order to have the right to consider ourselves well-educated persons? Our predecessors, as has been pointed out, would have answered this question in the affirmative: "A man," they would say, "to be well educated must know the classics; he must enjoy literature." I do not know of any particular traits of character which were regarded as essential. At present the question usually would be answered in the negative. It is true that if we ask a college professor he might mention his own specialty as essential to all well-educated persons, prefixing one more subject for the sake of appearances. And indeed if we take as a guide the prescribed studies in the course for the Bachelor of Arts degree in our leading universities and colleges, we shall find that many apparently still regard just enough Latin to use up considerable enthusiasm for education, though not enough to give any real mastery over the subject, as essential to a liberal education. Logic too is still often found among the list of essentials, as is also Philosophy, though it now looks as though Political Science were about to take the place on the list formerly occupied by the science of Berkeley and Kant. On the whole, however, the general tendency is, I believe, toward the course for the Bachelor of Arts degree, entirely elective. This means that there is a tendency to cease to consider only one subject as, under all circumstances, essential to the well-educated man or woman.

While I have thrown intentionally some slight ridicule on those who still hold that Latin or Logic, or work in Political Science, or indeed in any given subject is essential to produce the educated person, I have done so solely because I desire to

combat that which I believe is the opposite, and to-day much more popular error; namely, that to you and I as individuals there is nothing which is essential in order that we may regard ourselves as well-educated persons. There is a wide difference between the assertion that all persons to be well-educated must pursue particular studies, and the assertion that to each individual certain studies may be necessary before that individual can consider himself or herself well educated. Admit for a moment that the old idea that certain definite things are essential to an education is no longer tenable, there still remains the question: Is there anything essential to my education?

Perhaps I can best make clear the reason for the answer indicated to this question by again suggesting two examples. John Smith is a college graduate, he is more or less familiar with the best literature, he reads at least one foreign language, knows something of history, has at one time read the constitution of the United States, has ideas, and is by no means averse to acquiring certain kinds of information. You say at once: "A typical college graduate, a well-educated man." But there are other elements in the picture. John Smith is the possessor of a place in the country where he expects to spend his summers; he owns a house in town, and he has also every prospect of inheriting the shipping business on which his father's wealth depends. He is absolutely ignorant of nature, he cannot tell one tree from another. When he walks through his fields the leaves and flowers have no story to tell him. As a resident of the city he is again ignorant of the things around him. For the problems of his complex life he has no solution. He does not know there are problems. Of the municipal laws which affect his property he knows little, and of the international trade on which the business he is to inherit depends—nothing. Is he a well-educated man? Many would still call him so, but is there not something radically wrong in a conception of education which permits him to pass as such? Take another example. Miss A is a graduate of a university. She is widely read, and is besides a good chemist. In some situations she is an educated woman. She chooses to marry, and, having done so, neglects to inform herself concern-

ing the conduct of a house or the upbringing of a family. Has she not forfeited the right to be called a well-educated person? She may be informed on many things, but has she not lost the fundamental educational instinct of the little child which leads it to examine with care the things which its hands touch? I do not know whether the two examples I have given have made my meaning clear. But the point of view that I am trying to impress upon you is this: That to each one of us there is a knowledge which is essential to our education—this is a knowledge of the things which touch our life; that the right to regard ourselves as well-educated persons may be lost, if, thrown in a new situation, we do not instantly seek to inform ourselves concerning the new things with which the change has brought us into contact.

I am aware that the statement that only those things are essential to our education which lead us to know that with which we come in contact, is liable to be misunderstood. Because we may believe that those who are learned in many things but know not those things which surround them, are not in any true sense well-educated persons, it does not follow that we should call every one well-educated who knows simply those things which fall within the small circle of his daily life. The farmer who knows his business, the woman who knows how to manage her home, are not because of this knowledge well educated. The breadth spoken of a moment ago is equally essential. It is our privilege to widen our surroundings, and it is one of the functions of education to accomplish this result. We can reach out and make part of our lives the economic or political questions of our day, the historical problems, or the discussions on art, science or literature. One may be interested in public questions, another in problems of trade, another in those of art, and each rightly call himself or herself well educated, provided each in reaching out to know the things outside the circle of his or her daily life, has not neglected the knowledge of those things which, so to speak, lie at their mental doors. A certain capacity to enjoy the beautiful in one or more forms, a certain range of knowledge, an ability to think on more than one class of subjects, this is essential to good education. But in all the wide range of human

knowledge there is only one class of things you must know before you can call yourselves well educated, and those are the things which touch your daily life. What these things are, how far you are deficient in their knowledge, is a question which it is the moral duty of each one of you to ask yourself, and keep asking yourself throughout your lives. For each one of us has a moral duty toward our fellows : To be, in our time and place, as far as in us lies, well-educated persons.

If this attitude toward education is correct, some at least, of the functions of the University and the character of the course for its liberal degree become clear. Nothing in the range of human knowledge or human endeavor, nothing in science, in art or in literature is beyond its scope. The university in determining its activities can draw a line, but not a circle. That is, the university may say : No one who has not a certain amount of preparatory education can matriculate with us ; but it should not say : It is not our function to give instruction on this or that branch of knowledge. Again, in prescribing its course for its liberal degree, no subject should be excluded from the list of electives, while on the other hand no one study should be required of all candidates, though each should be required to have a certain breadth or range in his electives.

Believing as I do in the principles just suggested, it will not be difficult for you to see the answer which I must give to the question I have asked : " Has the study of law a place in a liberal education ?" If all subjects have a place as electives in a liberal course, law has a place. If no one subject can be regarded as essential to the liberal education of all persons, law should not be so regarded.

In England to-day, the Roman law, and to some extent the modern civil law, that is, the private law of the Continent of Europe, is taught at both Oxford and Cambridge, and has been taught from the earliest times. The Common law was not taught in an English University, until Sir William Blackstone was elected Vinerian Professor, even to-day the instruction is, from our point of view, extremely meager. The obligations arising out of a contract between Marcus Tertullius and Lucius Aurelius are, and always have been, considered

worthy of the attention of the person of culture, but the same questions arising between Jones and Smith are too practical to be included in a liberal education. The recognized place in the liberal courses in English universities held by Roman law, and the absence even to-day of efficient instruction in the common law is due, like so many of our own educational practices and ideals, to the monastic origin of the universities. We cannot blame the monk or ecclesiastic of the middle ages, as he compared what he knew of Roman order and civilization with the rudeness and confusion of his own time, that he regarded only the things of Roman origin as worthy the serious attention of the scholar. It is, however, to the last degree extraordinary, now that it is generally recognized that perhaps the highest production of our civilization is our common law, that the study of our legal system is yet far from being recognized as a study which is worthy to be considered as having the right to a place in our system of liberal education. In America, while we have broken away from the English idea that the common law has no proper place in a university, we have followed the English universities in welcoming the Roman, while excluding the common law from our college courses. Harvard University established its law school in 1817. To-day all our universities have schools of law. On the other hand, we have excluded from our colleges the study of our own law, while readily admitting the study of the law of the ancient Roman. Our idea has been that the law is for the would-be lawyer alone, and that the man, not to speak of the woman, who sought a liberal education must not spend any time on things so intimately connected with his own life and the history of his race as the rules regulating property and contracts. To-day, however, I am glad to say we are beginning to see a change. Subjects connected with our private law are creeping into the liberal courses of our universities and colleges. This is being brought about in one of two ways. In many universities the applicant for the degree of Bachelor of Arts can elect the last year of his course in the law school. Among the principal law schools of the country which allow a student to take a combined college and law course in six years are : the Universities of Wisconsin, Michi-

gan, Iowa, Columbia and the Northwestern University in Illinois. In other universities, as in the University of Pennsylvania, elementary courses in law and legal history are being established, not only for those who on graduation intend to enter a law school, but also for those who desire to know something of those principles which regulate controversies over the ownership of property, and the interpretation of contracts and the redress of private wrongs. My own feeling is that both innovations are wise, but that the second is destined to have a far greater educational effect. To allow a man or woman in his or her senior year at college to elect the freshman year in law means that one may take a combined college and law course in six years, not that the college student who does not intend to take up law as a profession will avail himself or herself of the opportunity to learn some law. But when a university offers courses in law designed for the person who desires a liberal education, then an ever increasing number of our college students will, I believe, elect such a course. This will certainly be the case if any considerable number apply, before choosing their electives, the test which I have suggested as indicating the subjects which are essential to him or her as an educated person. There are doubtless many who will not be brought into any more intelligent touch with their surroundings through an elementary knowledge of the law. Thus, while they may elect a course in law to broaden their mental horizon they cannot regard it as an essential to their education. There is, however, hardly any single subject which touches so intimately the lives of so many of the class of persons who make up the bulk of the students of our universities. To the man or woman who looks forward to business life, or the care of property; to persons choosing professions which bring them into contact with the active affairs of life; to all who are to have contractual dealings with others, some knowledge of the law is, before they may consider themselves well educated, essential. Law has no more or less a claim to be required by all those who seek a liberal degree than Greek or philosophy. What is peculiar to law is this, that because it deals with subjects which touch the lives of a great number of persons, it is a subject which is more apt to be essential to

the proper education of the average college student than nine-tenths of the subjects which for years have not only been considered proper for a liberal education, but have held an undisputed place as required studies. I rejoice to believe that the time is not far distant when courses in elementary law such as the one you have taken will be included in the list of electives in all our colleges.

STATUS OF INHABITANTS OF TERRITORY ACQUIRED BY DISCOVERY, PURCHASE, CESSION, OR CONQUEST, ACCORDING TO THE USAGE OF THE UNITED STATES.

From an early period in American history two principal theories were entertained and insisted upon by their respective advocates in reference to the power to acquire territory. These theories were conflicting, and were influenced by the opposing interpretations which the national and states rights schools placed upon the powers of Congress under constitutional grants. The states rights school at first denied that the United States had power under the Constitution to acquire new territory; the national school insisted that the power existed and was necessarily inherent in the government as an attribute of sovereignty. Notwithstanding the doubt and denial of the extreme state rights school, Louisiana and Florida were acquired by purchase, Texas by annexation, and an extensive territory was acquired by treaty with Mexico. The annexation of the Hawaiian Islands was effected by joint resolution of Congress. The Northwestern territory, acquired previous to the adoption of the Federal Constitution, by cession from Virginia, was regulated by "An ordinance for the government of the territory of the United States northwest of the River Ohio," adopted by the Old Congress, July 13, 1787. Territorial governments have from time to time been organized out of the other territories of the United States. The recent act of Congress organizing the territory of Hawaii prescribes specifically what classes of the inhabitants shall be deemed citizens of the United States.

The character and extent of the power of Congress over the territories have been the subject of repeated and excited discussion in and out of Congress. The National School have insisted that, under the Constitution, Congress have absolute and despotic power over the territories; that whatever they have the power to do, they have the right to do, if in their judgment it will conduce to the "general welfare." And they

construe the power "to dispose of and make all needful regulations respecting the territory or other property belonging to the United States," as the same in effect as the "power to exercise legislation in all cases whatsoever."

The states rights school have held that the clause in the Constitution about the territories relates to them only as property, and gives no right to Congress to govern them: that their right to government springs from their acquisition of them by cession, and is not therefore absolute. Territory acquired under the right to declare war and make treaties belongs to the states as states, and Congress can only legislate in conformity to the principles of the Constitution. They have the authority to maintain peace and order, and to establish tribunals for the administration of criminal and civil justice according to the law of the land as it existed at the time of the cession; but they can no more change the law of the land in a territory than they can in a state. They cannot regulate private property or interfere with private rights. In short, the law of the ceded territory on all subjects not within the delegated powers of Congress in the states must continue until changed by the only legitimate authority, when the people of such territory, with the authority of Congress, form a sovereign state. To state briefly the essence of these conflicting theories in respect of the character and extent of the constitutional power of Congress, as has just been done in the language of an eminent American jurist, is to suggest the relative soundness and infirmity of the respective doctrines. Meanwhile the usage in respect to the government of territories has followed the inclination of the National School; occasionally this course has been modified and qualified as the result of judicial interpretation. The trend of federal decisions, however, has been in support of the doctrines of the National School.

It is to be observed that there are two separate and distinct subjects to be kept in mind in any discussion that aims at an intelligent, practical conclusion; first, the territory, pure and simple, as property; second, the inhabitants, as distinct from, yet occupying, the territory. The law and usage which govern territory as property of the sovereign are one thing; the

people over whose lives, liberty and property the new sovereign claims to exercise dominion and government is quite another thing ; and some of the confusion which characterizes much discussion in this regard will be avoided if this distinction is considered. As to the territory, meaning the public land and public property, the power of the new sovereign is absolute : but in respect to the inhabitants,—the people, being freemen,—the power of the new sovereign is, to a certain extent, correspondent to that of the former sovereign, and may be further qualified by public law, usage, treaty stipulations and by the fundamental principles recognized and immemorially proclaimed by the state of the new sovereign. " But it is not easy to distinguish between what are political and what are municipal laws, and to determine when and how far the constitution and laws of the conqueror change or replace those of the conquered."¹ As between the new government and the citizen, protection and allegiance are reciprocal ; but this relation does not by any means imply that political privileges and franchises are included in the recognition of the property and personal rights of the inhabitants. Political franchises are presumably granted on grounds of expediency, having in view the safety of the state and the best interest of the community. The immediate property which is possessed by individuals is therefore to be distinguished from the ultimate property in the territory of the state, and the objects of property accessory to it, which is vested in the state itself. As a member of the family of nations, the United States recognizes and is bound by principles of public law as its rule of action in all matters having an international character ; but when it is question of municipal administration in matters not affecting the international relation, it looks alone to the Constitution, its municipal law and the usage of civilized states for guidance and direction.

The general usage sanctioned by treaty stipulations has been to constitute the inhabitants of acquired territory citizens of the United States under conditions and with exceptions specially indicated ; they belong to that class of individuals who, in matters of personal and civil rights, are under the protection

¹ Halleck, *International Law* (Baker's edition), p. 48s.

of the new sovereign, though they are not yet clothed with political status or the privilege of suffrage. In the absence of treaty stipulations in regard to national character, the inhabitants of conquered territory are subject to military dominion and protection, and remain so subject until the new sovereign provides a civil government in substitution of the military authority. In the American system of government the power to change this condition and situation from military domination to civil government is resident in Congress. Until this change is authorized by the appropriate legislative authority, the President, however, as commander-in-chief of the army, would be clothed with absolute power in this regard, were not the lives, liberty and property of the inhabitants guaranteed and safeguarded by public law, and the municipal law locally in force. The usual and wise practice is the recognition of the municipal laws by the military authority and the establishment of a provisional quasi-civil administration until Congress legislates. The conquered territory while in this transition state is not a part of the United States within constitutional and legislative provision and enactment, unless expressly included in terms, although in international relations it may be so treated and considered. In the case of a guano island the Supreme Court considered it "as appertaining to the United States."¹ This is doubtless an anomalous position, but it is one which appears to follow unavoidably as the result of peculiar and exceptional conditions. So long as it continues, much hardship may be entailed upon the innocent inhabitants, which would appeal forcibly for relief to the legislative power and to executive discretion; but these considerations do not alter the accidental, provisional status of the territory or of its native inhabitants. The reason assigned for this exclusion of the island inhabitants from American citizenship, appears to be that our Insular possessions *have not yet been admitted into the Union, although the territory in which they reside is presently under the military jurisdiction and avowedly the property of the United States*. Under the American system of civil government, the inhabitants who are citizens are naturally divided into two general classes: First, all the

¹ Jones v. U. S., 137 U. S., p. 202-212.

inhabitants who are secured by the fundamental law in their civil, personal and property rights; second, a limited and privileged class, who are clothed with political franchise and privileges. The inhabitants of conquered territory are within the first division, but they are not within the second and privileged division unless embraced in treaty stipulations, or until Congress acts and ordains the conditions upon which they may be admitted to the various grades of citizenship. Judicial sanction in support of this position may be found in numerous decisions of the Supreme Court of the United States. It was said, in the case of *Ramsay v. Murphy* (114 U. S. 44), by the Supreme Court of the United States recently, that : "The people of the United States, as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the Government of the United States, to whom all the powers of government over that subject have been delegated, *subject only to such restrictions as are expressed in the Constitution*, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be admitted in respect to this, as to every power over its members, that it is not absolute and unlimited." This language in reference to constitutional restrictions it is to be observed, was used in the case of a claim to vote by certain inhibited classes *in an organized civil territorial government*, and *not* the case of *inhabitants* of territory under military dominion. In the same case it was said : "The personal and civil rights of the inhabitants of the territories are secured to them, *as to other citizens*, by the principles of constitutional liberty which restrain all the agencies of government, state and national; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States." In the *Dred. Scott* case, Ch. J. Taney declared that the citizens of our territories were entitled to all the privileges and immunities guaranteed by the bill of rights. The attention of the court, however, was not drawn to any distinction between provisions for the people of the United States and provisions for persons generally without reference to their political relations or allegiance. And Simeon E. Baldwin adds : "It is a

subtle distinction, but I am inclined to think that it is a real one, which would be found of substantial service should the Senate ratify the Spanish treaty as it stands."¹

In 1853, in a case arising out of the imposition of a war tariff by military authority at San Francisco, while such occupation continued the same court said :

"The formation of the civil government in California, when it was done, was the lawful exercise of a belligerent right over a conquered territory. It was the existing government when the territory was ceded to the United States, as a conquest, and did not cease, as a matter of course, or as a consequence of the restoration of peace; and was rightfully continued after peace was made with Mexico, until Congress legislated otherwise, under its constitutional power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." *Cross v. Harrison*, 16 Howard, U. S., p. 164.

When the Peace Commissioners at Paris reached a point in their deliberations when it was determined to provide for the future status of Spanish subjects, natives of the Peninsula, residing in the territory over which Spain relinquished or ceded her sovereignty, as well as for the native inhabitants, they formulated their conclusions in Article IX. In its first clause, it provided for the right of election of national character by Spanish subjects therein residing, to be exercised within a year from the ratification of the treaty. The second clause was in the words following: "The civil rights and political status of the native inhabitants of the territories ceded to the United States shall be determined by the Congress." This language is peculiar, and differs from the corresponding stipulations in respect to the guarantees extended to the native inhabitants, found in the treaty for the Louisiana purchase, the Florida Treaty, and the Joint Resolution for the annexation of Texas. In the Philippines archipelago the attitude of the United States is unique. We purchased and paid Spain for the archipelago; but her sovereignty had been long contested, was contested at date of purchase, and she was not able to deliver the territory and its accompanying

¹ "The People of the United States," Yale Law Journal, January, 1899.

public property, and the United States has been constrained to insist upon her title by act of war and conquest, which is not yet complete.

This clause referring the determination of the civil rights and political status of the native inhabitants to Congress was, no doubt, inserted in view of the antecedent history of territorial acquisitions by the United States, recent American history, and with particular reference to racial conditons existing in these ceded territories. Being a provision in a treaty ratified by the United States, it is, and until abrogated by a law of Congress, will remain the supreme law of the land.

The conclusion is, that so long as the ceded territories remain under military dominion of the United States, the President, in the exercise of the belligerent right of conquest, unless restrained by public law, treaty stipulations or usage, possesses almost absolute power over the territory and its inhabitants; and this authority is paramount until Congress shall legislate in respect thereto. What Congress may do under constitutional grant or in the exercise of legislative sovereign power is one thing; what Congress should do in the contingencies presently arising in our insular possessions and under the stress of public opinion is quite another matter. From a political standpoint merely, it is a question of expediency rather than a question of the extent and character of the power to be exercised, wherever lodged. Addressed to administrative party government, it may be a question of policy; addressed to the moral sentiment of the community, it is a question of justice, equity, accommodation and fair dealing.

"In case the government of the new State is a constitutional government of limited and divided powers, questions necessarily arise respecting the authority, which, in the absence of legislative action, can be exercised in the conquered territory. after the cessation of war, and the conclusion of a treaty of peace. The determination of these questions depends upon the institutions and laws of the new sovereign, which, though conformable to the general rule of the law of nations, affect the construction and application of that rule to particular cases." (Halleck, *Int. Law*, Baker's ed., p. 482. *American*

Institute Co. v. Canter, 1 Peters, 511, 541; *Mormon Church v. U. S.*, 136 U. S. 42; *Jones v. U. S.*, 137 U. S. 202, 212.)

Many of these are questions to be determined primarily by the political branch of the government, and its decision will be followed by the judiciary. The acquisition of new territory by war or treaty, is political, not judicial. And the ascertainment as a fact, belongs to the executive and legislative departments and not to the judicial departments.

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Washington, D. C.

A HUNDRED AND TEN YEARS OF THE CONSTITUTION.—PART X.

It can hardly be necessary to remind the reader that we are indebted to Mr. Madison for almost all we know of the proceedings of the Convention. Yates, it is true, took short minutes, during the time he attended. But it is to Mr. Madison that we must look for extended information. Writing many years later, he tells us that he had determined to preserve as well as he could an exact account of what passed in the Convention "whilst executing its trust; with the magnitude of which I was duly impressed, as I was by the gratification promised to future curiosity by an authentic exhibition of the objects, the opinions, and the reasonings, from which the new system of government was to receive its peculiar structure and organization. Nor was I unaware of the value of such a contribution to the fund of materials for the history of a Constitution in which would be staked the happiness of a people great even in its infancy, and possibly the cause of liberty throughout the world." The better to perform his self-imposed task, he chose a seat in "a favorable position for hearing all that passed"—and carefully noted, in a sort of shorthand, all that was said, writing out his notes daily, or within a day or two, and never being absent from the Convention a single hour of a single day. He tells us that the radical weakness of the Confederation was "the dependence of Congress on the voluntary and simultaneous compliance with its requisitions by so many independent communities, each consulting more or less its particular interests and convenience and distrusting the compliance of others"—and after reciting some of the consequences of these fundamental defects, he adds that it was to cure these defects that the Convention assembled, and they "ought never to be overlooked in expounding and appreciating the Constitutional Charter, the remedy that was provided." In a letter to Mr. Randolph under date of April 8, 1787, in anticipation of the assembling

of the Convention in the following month, in what I consider a truly remarkable passage in its clearness, wisdom, and foresight, he says "I hold it for a fundamental point that an individual independence of the states is utterly irreconcilable with the idea of an aggregate sovereignty. I think, at the same time, that a consolidation of the states with one simple republic is not less unattainable than it would be inexpedient. Let it be tried, then, whether any middle ground can be taken, which will at once support a due supremacy of the national authority, and leave in force the local authorities so far as they can be subordinately useful." Now, these were Mr. Madison's ideas, before, and long after, the Convention—we have heard him in debate during its sessions—and after noticing a few of his expressions shortly after the adjournment, while its work was being reviewed in Congress and in the various state conventions, let us pass to a consideration of what was done in Congress and in these conventions.

Writing to General Washington on September 30, 1787, Mr. Madison says that the answer given to those who contended that Congress could not properly urge the adoption of a Constitution subversive of the very articles to which it owed its existence, was the reason given by Congress for recommending the Convention, viz: that it was the best means of forming a firm *National Government* (italics in the original) and on October 20th of the same year he writes Mr. Randolph from New York that the papers in the Northern and Middle States are full of controversial articles, the articles being chiefly leveled against the organization of the government, and the omission of provisions as to juries, etc.—(provisions which would have been ridiculous in a treaty of alliance). But there is one combatant, it seems, who "strikes at the foundation. He represents the situation of the United States to be such as to render any government improper and impracticable which forms the states into one nation, and is to operate directly on the people." If this is not strong testimony, from friend and foe, as to the contemporary estimation of what the new government

really was, it will be hard to find any. Again, writing to the same gentleman in March, 1788, he says that the owing to certain occurrences "the opposition (to the Constitution) here, which are unquestionably hostile to everything beyond the *federal* principle, will take new spirits." (*Italics in the original.*)

The Convention transmitted the results of its labors to Congress, accompanied by a letter briefly stating the general reasons which moved them to recommend the Constitution, saying *inter alia* "In all our deliberations on this subject we kept steadily in our view, that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence."

Congress at once resolved unanimously to transmit the Constitution to the legislatures of the several states in order that they might be submitted to a specially chosen Convention in each state for ratification. We must consider the debates in the various state conventions with some care. If the general Convention framed the Constitution, these conventions ratified it, and their conception of its meaning is therefore most important. Let us begin with the debates in the then leading Commonwealth—Virginia.

Virginia did not hold her Convention for the consideration of the Constitution until June, 1788; in the meantime eight states had ratified it, a point upon which much stress was laid in the debates. The Convention was a large body, consisting of about one hundred and seventy members. Several of the delegates to the general Convention were also sent to the State Convention, and there were also present a number of well known and distinguished men, "with a good many more of a lesser degree." As is usual in such cases, comparatively few took the floor at all, and still fewer took a really active part in the deliberations, and, also as usual, several gentlemen were constantly on their feet, notably Patrick Henry, who had refused to serve as a delegate to the general Convention. The Constitution does not seem to

have been considered with very great particularity. Many of its provisions, indeed, were not discussed at all. But the *general nature* of the instrument was discussed almost *ad nauseam*. Much real ability was displayed, and on the other hand, much wild, absurd talk was indulged in, that must have sorely tried the patience of the saner minds in the Convention. There was also, of course, some more or less adroit manœuvring; and no doubt a great deal that was said was dictated by motives of self-interest, direct or indirect. By most of the opponents of the Constitution, there is shown a distrust of Americans in general, which leads one to wonder that they could look with equanimity upon popular government at all! Mr. Madison, who gave evidence in this Convention as in the general Convention, of extraordinary mental balance, and equally extraordinary tactfulness, after having been wearied with this distrustful attitude of some members for many days, let fall the following words of wisdom, which should be read, learned and inwardly digested by all lovers of good government: "I have observed that gentlemen suppose that the general legislature will do everything mischievous they possibly can, and that they will omit to do everything good which they are authorized to do. If this were a reasonable supposition, their objections would be good. I consider it reasonable to conclude that they will as readily do their duty as deviate from it; nor do I go on the grounds mentioned by gentlemen on the other side—that we are to place unlimited confidence in them, and expect nothing but the most exalted integrity and sublime virtue. But I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there is not, we are in a wretched situation. No theoretical checks, no form of government, can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea. If there be sufficient virtue and intelligence in the community, it will be exercised in the selection of these men; so that we do not depend on their virtue, or put con-

fidence in our rulers, but in the people who are to choose them."

In general, the argument against the Constitution may be said to have been: that it formed a consolidated government to the practical annihilation of the state governments, and by so doing endangered the liberties of the people and paved the way for the establishment of a despotism: that the power of direct taxation would produce a conflict of authority between the national and state tax-gatherers, and as the National Constitution was to be the supreme law of the land, the state authorities must go to the wall: that it therefore placed Virginians at the mercy of a majority from other states, who might impose taxes on Virginian and Southern products, etc., and that it contained no bill of rights to protect the people against deprivation of the right of trial by jury, freedom of the press, etc., and that Virginia should not assent to it without previous amendments explicitly securing these and kindred rights, and in express terms reserving to the states all powers not delegated to the general government. The most bitter and violent opponent of the Constitution was Patrick Henry, whose fertile brain and lively imagination conjured up all sorts of horrors as certain consequences of its adoption. The opposition were never tired of pronouncing the Constitution a scheme for a great consolidated (i. e. centralized) government sometimes asserting that it was "admittedly" so, expecting, we must suppose, to play upon the alarms of the people, always tenacious of local self-government and of their liberties, and to embarrass the supporters of the Constitution, who could not deny that it meant a certain degree of consolidation, and were put to great pains to show that great care had been taken to prevent undue centralization, and to preserve as far as compatible with a firm National Union, not only the local authority of the states, but their existence as distinct political entities.

The Convention plunged at once *in medias res*. It was hardly fairly organized before Mr. Henry started the ball rolling, by asking by what authority the general Convention had used the words "we the people" instead of "we

the states" in the preamble? (A point which oddly enough had caused little or no discussion in the General Convention.) He said that it was "demonstrably clear that a great consolidated government was to be formed instead of a Confederation." As to the expression "we the people" he was replied to by Mr. Randolph, Mr. Pendleton, Mr. Lee, and Mr. Corbin—by Mr. Randolph by the counter question "Why not?"—since the government was for the people, and that it was a misfortune that the people had no agency in the government before. By Mr. Pendleton by the question "Who but the people have the right to form governments," or delegate powers? and he intimated that the state government had nothing to do with it. By Mr. Lee, that it was a proper expression because the government was to operate on the people, if adopted. By Mr. Corbin, to substantially the same effect.

Mr. Henry adhered stubbornly throughout the entire sessions to his assertion that the government would be consolidated and utterly unfederal, although to use his own words, it had been alleged "to be national and federal as it suited the arguments of gentlemen," and toward the close of the session, Mr. Dawson said that its friends had "admitted that it possesses few federal features, and will ultimately end in a consolidated government, a truth which in my opinion they would have denied in vain; for every article, every section, every clause, almost every line, proves that it will have this tendency." Mr. Mason, a former member of the general Convention, was equally positive. Mr. Grayson did not feel obliged to accept something quite different from the Confederation.

The defenders of the Constitution nowhere denied that it was radically different from the Confederation articles. Mr. Lee denied that it was conceded to be a "National" (centralized) government, and once more we have Mr. Madison as the clearest exponent of the true intent of the Constitution as framed. He says it differs radically from the confederation in that it forms a government partly consolidated, partly federal. "It is in a manner unprecedented; we cannot find one express example in the experience of the world. It stands by itself. * * I can say

notwithstanding what the honorable gentleman has said that this government is not completely consolidated, nor is it entirely federal. Who are parties to it? The people,—but not the people as composing one great body; but the people as composing thirteen sovereignties. * * Should all the states adopt it, it will be then a government established by the thirteen States of America, not through the intervention of the legislatures, but by the people at large. In this particular respect the distinction between the existing and proposed government is very material. The existing system has been derived from the dependent derivative authority of the legislatures of the states; whereas this is derived from the superior power of the people. If we look at the manner in which alterations are to be made in it, the same idea is, in some degree, attended to. By the new system, a majority of the states cannot introduce amendments; nor are all the states required for that purpose. * * In this there is a departure from the federal idea. The members of the National House of Representatives are to be chosen by the people at large in proportion to the numbers in the respective districts. When we come to the Senate its members are elected by the states in their equal and political capacity. But had the government been completely consolidated, the Senate would have been chosen by the people in their individual capacity, in the same manner as members of the other house. Thus it is of a complicated nature.” In spite of this, the assertion was again and again made afterwards by the enemies of the Constitution that it meant a consolidated government pure and simple, to all practical intents and purposes. In defending the Constitution, it was not difficult to show how unfounded were the fears and gloomy prognostications as to loss of liberty, despotism, etc., to the more logical minds. The forced and strained construction put upon the words of the Constitution by its opponents was so grotesque at times as to excite disgust. But what could not be denied was, that the new government would be essentially different from the old, that it would act directly upon the people in many instances. And the main

struggle was really as to whether a bill of rights and cognate amendments should be required as a condition precedent to Virginia's assent.

The absolute necessity of *Union* was insisted upon over and over again, and in the strongest terms, by the advocates of the Constitution, and the establishment and perpetuation of that Union was declared to be the main object in forming the Constitution. Mr. Randolph calls the Union "the anchor of our political salvation," and equally strong expressions are quite frequent. And now let us examine the proceedings of the Convention a little more in detail. It was determined at the outset to consider and debate the Constitution "clause by clause," and yet in practice the rule was at once departed from, owing to Mr. Henry's vehement and passionate condemnation of the Constitution as a whole, which brought forth replies and counter replies, so that more than one-half in volume, and about one-half in time, of the debates in the entire session was devoted to a general discussion, quite desultory in character, with the first and second sections of Article I nominally under consideration; the third section was not read until June 14th; the Convention assembled on June 2d and concluded its debates on June 25th, adjourning two days later. So far as we are at present concerned the first "particular" discussion of any importance arose as to the clause of Article I, Section 8, which gives Congress power to call forth the militia to execute the laws of the Union, etc., to which it was objected that by this too much power was taken from the states and given to the general government, and that it would lead to the establishment of a standing army; and further that Congress might drag the militia to immense distances. To this Mr. Madison replied that the existence and control of the *militia* was the best guarantee that a standing army would not be necessary, and that the abuse of power in dragging the militia to immense distances was not likely to occur where there was a "government of a federal nature, consisting of many co-equal sovereignties, and particularly having one branch chosen by the people." As to taking the militia away from the

state governments, he stated that the Congressional power over it was concurrent, not exclusive. And when a little later it was contended by the alarmists that under the Constitution, if the state governments had any control over the militia it was *by implication*, Mr. John Marshall replied that the state governments did not derive their power from the general government; but each government derived its powers from the people, and each was to act according to the powers given it. There was also quite a discussion as to the clause giving Congress the power of exclusive legislation over a district ten miles square. It was fraught with terrible dangers to the liberties of the people inhabiting the vast area outside of it, thought Mr. Mason; the district would become a sort of sanctuary for the blackest criminals, and for fugitive slaves, etc., etc. Even at this late date, it is difficult to keep one's temper in reading such balderdash!

When the ninth section was read, Mr. Henry rose and declared that this section was really a bill of rights, that it prescribed the limits beyond which Congress could not go. He argued that outside of these prohibitions, they could do what they pleased, and as in his judgment this "bill of rights" was totally inadequate for the protection of the liberties of the people, a more substantial provision in the shape of a real bill of rights should go in. The argument was plausible, certainly, and there could be but one answer to it, namely, that the restrictions were exceptions to *particular* powers, express or implied, and not to a general power. This was the answer made by Mr. Randolph, and elaborated by him. In some instances, his ingenuity was taxed a good deal to find the particular power abridged, but as a matter of fact, wherever the power is hard to find, the restriction is unnecessary. For even had the Constitution been silent on the subject, it is hard to find where Congress had been expressly or impliedly authorized to grant titles of nobility, for example. As to the tenth section (containing restrictions upon the powers of the states) there was comparatively little discussion, and most of the objections were of a temporary character. Now, it is noteworthy

that many highly important and highly sovereign powers conferred upon Congress and taken from the states were not discussed at all, but passed, as it were, *sub silentio*. For example: (1) The power to lay duties on imports. (2) To regulate commerce. (3) To establish uniform naturalization laws. (4) To coin money, etc. (5) To declare war, etc. In a discussion at a later stage (Art. II, Sec. 2), which we need not now follow in detail, some significant remarks were made of a general nature. Mr. Grayson said the Constitution would be the "Great Charter" of America. "After having once consented to it, we cannot recede from it." And Mr. Randolph said that it followed from the nature of civil association that no particular part shall sacrifice the whole. And Mr. Corbin contended that the "empire" could not be dismembered without the consent of the part dismembered. When the question of the propriety of the establishment of inferior federal courts was under discussion, and it was warmly debated, Mr. Mason said that he believed that the Constitution was *intended* to destroy the state governments, and gradually bring about one great, national consolidated government, which many gentlemen in the United States thought advisable. Mr. Madison interrupted to ask to whom he referred, as without explanation his hearers might think he referred to all the members of the late Convention, to which Mr. Mason replied that he had not referred to any one from Virginia, but it was notorious that it was "a prevailing opinion," with which explanation Mr. Madison declared himself satisfied. Whether this statement was a shrewd move on the part of Mr. Mason to prejudice the minds of the members, or whether he really believed what he said, it is impossible to say. Mr. Madison very naturally declined to be placed in a false position. For there can be no question that any *truly* consolidated, centralized government, annihilating the state governments, would never have been set up by the American people at that time, or since, for that matter. And we have seen in an examination of the debates of the general Convention that no such a view as that stated by Mr. Mason was held except possibly by the very few extremists, if

indeed by anyone. It is the old difference between a *National* and a *Centralized* government, by no means synonymous terms. In the words of Mr. Pendleton, "I should understand a consolidated government to be that which should have the sole and exclusive power, legislative, executive and judicial, without any limitation." And such a government it is ridiculous to say that the Constitution was intended to establish either all at once or gradually by its general tendency. As before suggested, the absence of a bill of rights and of a specific declaration that all powers not granted were reserved, inclined some members to insist upon their insertion as a condition precedent to ratification; while others felt that while not expressed, a bill of rights was clearly understood, and that by the very nature of the instrument the government organized under it could only have the powers conferred by it, and moreover, that an incomplete bill of rights was worse than none; and that it would be far worse to imperil the Union by insisting on amendments to the Constitution previous to its adoption, than to trust to proper amendments being made afterwards. It had been suggested that in ratifying the Constitution, the Convention should insert a declaration to the effect that all the powers in the Constitution were derived from the people and might be rescinded by them whensoever they should be perverted to their injury or oppression, a self-evident truth, it would seem; and Mr. Nicholas, a friend to the Constitution, argued that there could be no danger in adopting it in this way, "for these expressions will become a part of the contract. The Constitution cannot be binding on Virginia but with these conditions. If thirteen individuals are about to make a contract, and one agrees to it, but at the same time declares that he understands its meaning, significance, and intent to be (what the words of the contract plainly and obviously denote) that it is not to be construed so as to impose any supplementary conditions upon him, and that he is to be exonerated from it whensoever any such imposition shall be attempted. I ask whether, in this case, these conditions, on which he assented to it, would not be binding on the other twelve.

In like manner these conditions will be binding on Congress. They can exercise no power that is not expressly granted to them." With the soundness of this view we need not now concern ourselves; and whether they really expressed Mr. Nicholas' belief is not certain; he was arguing in favor of the adoption of the Constitution and endeavoring to quiet the fears of the more sensitive as to undue centralization as a result of adoption without previous amendments. No comment was made upon Mr. Nicholas' remarks, and no one else made the same argument. On the contrary, the argument of the opponents of the Constitution was that after ratification it would be *too late to secure amendments*, possibly they might be made, and possibly not. Mr. Innes said that in his opinion all the Convention could do was to accept or reject the Constitution, not to accept conditionally. The final result of the deliberations was, that by a vote of eighty-nine to seventy nine, the Constitution was ratified in the following form: "VIRGINIA, to wit: We, the delegates of the people of Virginia, duly elected in pursuance of a recommendation from the General Assembly, and now met in Convention, having fully and freely investigated and discussed the proceedings of the Federal Convention, and being prepared, as well as the most mature deliberation hath enabled us, to decide thereon, Do in the name and in behalf of the people of Virginia, declare and make known, that the powers granted under the Constitution, being derived from the people of the United States, be rescinded by them whensoever the same shall be perverted to their injury or oppression, and that every power, *not granted thereby remains with them and at their will* (italics in the original); that, therefore, no right, of any denomination, can be cancelled, abridged, restrained, or modified, by the Congress, by the Senate or House of Representatives, acting in any capacity, by the President, or any department or officer of the United States, except in those instances in which power is given by the Constitution for those purposes; and that, among other essential rights, the liberty of conscience and of the press cannot be cancelled, abridged, restrained, or

modified by any authority of the United States. With these impressions, with a solemn appeal to the Searcher of hearts for the purity of our intentions, and under the conviction that whatsoever imperfections may exist in the Constitution ought rather to be examined in the mode prescribed therein, than to bring the Union into danger by delay, with a hope of obtaining amendments previous to the ratification, We, the said delegates, in the name and behalf of the people of Virginia, do, by these presents, *assent to* and *ratify* the Constitution, recommended on the seventeenth day of September, one thousand seven hundred and eighty-seven, by the Federal Government for the United States; hereby announcing to all whom it may concern that the said Constitution is binding upon the said people, according to an authentic copy hereto annexed," etc. They then proceeded to draw up certain amendments to the Constitution, to be submitted to the first Congress assembled under it. The first of these was, that there should be a bill of rights attached to the Constitution "in some such manner" as the following, which is too long to transcribe. It consisted of twenty paragraphs, the first seven setting out somewhat in detail the principles of popular self-government, the balance setting out fully and explicitly the great personal rights for which our forefathers contended in and before the Revolution. In addition to the bill of rights, they recommended twenty other amendments, only a few of which we need notice just now: (1) "That each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the Federal Government." (3) "When Congress shall lay taxes or excises, they shall immediately inform the executive power of each state of the quota of such state, according to the census herein directed, which is proposed to be thereby raised; and if the legislature of any state shall pass a law which shall be effectual for raising such quota at the time required by Congress, the taxes and excises laid by Congress shall not be collected in such state." A motion to strike this amendment from the

list of those recommended failed by a vote of eighty-five to sixty-five. (11) The eleventh suggested amendment gave the states the control of the militia except when in the actual service of the United States. (12) The twelfth suggested amendment limits the power of Congress over the "ten miles square" district to such regulations as respect "the police and good government thereof." (14) The fourteenth suggested amendment limits the jurisdiction of the United States Courts, calls the inferior courts "Courts of Admiralty," and entirely abolishes federal jurisdiction between citizens of different states. (16) The sixteenth suggested amendment limits the power of Congress to regulate elections to cases in which the legislature has been unable, or has neglected, to do so. (17) The seventeenth suggested amendment provides that clauses declaring that Congress shall not exercise certain powers are not to be interpreted so as to extend the power of Congress, but taken as exceptions to specified powers, or "as inserted merely for greater caution."

Lucius S. Landreth.

COMPLETION OF CONTRACTS BY MAIL OR TELEGRAPH.

The determination of the time when and the place where the factors which make up a contract merge in the contract itself is important for manifold reasons. For instance, it determines the moment when neither party can retract without the consent of the other, the moment when a chattel ceases to be the property of one and becomes the property of another, and so free from the obligations of the one and subject to the obligations of the other, no longer at the risk or charge of the one but solely at that of the other.

The place where the contract is consummated determines the rule (*lex loci*) which must often decide its interpretation and its legality.

A contract, like a man, is generally a citizen of the country, not in which it was begotten, but in which it was born.

The considerations above often determine the liability for taxes or other liens and charges incident to the ownership of property, the possession of an insurable interest and the right to maintain an action with reference to the property in question.

As a natural result the subject has been much mooted in the courts, and yet some simple questions which, in the nature of things, it would seem, must have frequently arisen for generations past were not settled until well on in the present century and many are among the recent additions to the settled propositions of contract law among English-speaking men.

The rules which have seemed to crystallize out of the mists and conflicts of the earlier discussions are, in the main, satisfactory and consistent. It is interesting in teaching "the law of contracts," to see how well it seems to satisfy the sense of justice of the abler and more earnest students. They often try, I learn, on reading the statement of a case, to forecast the decision, and find themselves seldom astray in this branch of the law.

The process of the courts has been rather simple. A contract is analyzed into an offer and an acceptance. The

offer is no contract. It is only when an unqualified acceptance meets an offer still outstanding that a contract results, but, on such a meeting, the contract springs into existence, like Minerva from the brow of Jove, full panoplied *eo instante*. At that moment, in that place, the contract comes into being and must operate and be judged accordingly. Applying these rules it might seem easy to determine when and where a contract by correspondence is concluded, but the decision in individual cases has been often difficult and by divided courts, and the controversy over the question has been eager and unyielding among text writers and reviewers.

In 1818 the Court of King's Bench decided the much cited case of *Adams v. Lindsell*, 1 Barn. & Alderson 681, passing upon a claim for the non-delivery of wool, where defendants had sent by post to plaintiffs, in a neighboring county, offering 800 tods of fleeces of a certain quality at a named price, "receiving your answer in course of post." The offer was delayed by a misdirection. An answer accepting was sent by post the same evening the offer arrived. This answer, it was held, closed the contract the moment it was posted, and as the delay in replying was due to the defendant's negligence in a misdirection, it was held it could not prejudice plaintiff's rights. That a sale to others, on not getting the expected reply, would not relieve the defendant. The court said: "For if the defendants were not bound by their offer when accepted by the plaintiff till the answer was received, then the plaintiff ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*."

This doctrine received no material addition in England until the House of Lords decided, in 1848, *Dunlop v. Higgins*, 1 H. of Lds. Cases 381. The facts there passed on were that after some correspondence which had resulted in an offer of iron on certain terms from Dunlop, Messrs. Higgins immediately mailed a reply, "We will take the 2,000 tons you offer us." By mistake this reply was dated a day later than its true date, but the postmark showed it was mailed in due season. It was held to be an unconditional acceptance put in the post office in due time and that the contract was consummated

the instant it was posted, and the one mailing was in no way responsible for any casualties in the post-office establishment as for a delay in its delivery.

In this case the Lord Chancellor, in his opinion, quoted very freely from the preceding case and logically applied its doctrine.

In 1872 there was decided *In Re Imper. Land Co. of Marseilles*, Harris Case, Law Reports 7 Chan. Ap. 587, where Mr. Harris, of Dublin, had sent to the directors of the above company at London a letter asking for 200 shares, or any smaller amount, in the above company. One hundred shares were allotted him and a notification mailed to him on the fifteenth or on the sixteenth of March, very early in the morning. A letter was sent by him to the company, mailed on March 16, saying that he withdrew his offer to subscribe. The contract was held to have been completed the moment the company's secretary mailed to him the notification of the allotment made him, and his withdrawal of his offer was held ineffectual. The court reviews the case of *B. & A. Teleg. Co. v. Colson*, Law Reports, 6 Exch. 108, and while evidently disapproving that doctrine, yet holds that it decided that the posting of a letter of acceptance, if it arrives, is a complete contract, yet if from any cause, such as a failure of duty by the post office, the letter never arrives at all, then there is a difference.

In 1879 the Court of Appeal decided, *Household F. & C. Accident Ins. Co. (Limited) v. Grant*, Law Reports, 4 Exch. Div. 219. In that case Baggallay, L. J., speaking for the majority of the court, came to the conclusion that the House of Lords in *Dunlop v. Higgins*, *supra*, announced a rule inconsistent with the rule of Colson's case, and that a letter of acceptance duly posted, but never received, completed the contract and bound the parties from the moment of posting exactly as if received at that moment.

In *Byrne & Co. v. Van Tienhoven*, Law Reports, 5 Com. Pleas Div. 344, the High Court of Justice in 1880 decided an action for damages on this state of facts. The defendant at Cardiff, Wales, wrote to the plaintiff at New York, October 1, 1879, offering, 1,000 boxes of tin plates of a named brand, at a certain price, calling for a reply by cable on or before the

fifteenth *here*. The acceptance was cabled back October 11, and a letter of further acceptance posted October 15. October 8 defendant sent by post to the plaintiffs a withdrawal of the offer of October 1. This revocation reached the plaintiffs October 20 and so some days after the sending of the telegram and the letter of acceptance. It was claimed that this amounted to a withdrawal of the offer before its acceptance, but the New York house had already resold the tin and insisted upon the performance of the contract. The court declined to follow Pothier and other civilians of celebrity who are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made.

It set against that view the opinion expressed by our own Federal Supreme Court in *Taylor v. M. F. Ins. Co.*, cited below, that a state of the mind cannot be regarded in dealings between man and man, and that an uncommunicated revocation is, for all practical purposes and in point of law, no revocation at all.

It holds "It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted, even though it never reaches its destination." But it holds this rests on the principle that the offerer has expressly or impliedly made the post office his agent to receive the acceptance. That this principle is inapplicable to the withdrawal of an offer because there is no such assent by the other party that the post office should be his agent to receive such withdrawal. That any other rule would leave one who received an offer by post in utter uncertainty whether the contract was closed or not until such time had elapsed as to assure him no letter revoking the offer had been posted prior to his posting his acceptance. The eminent judge (Lindley, now Lord Lindley and Master of the Rolls) concludes that legal principle and practical convenience concur in supporting these views.

The case of *Henthorn v. Fraser*, Law Reports 2 Ch. (1892) 27, decided in the Court of Appeal in 1892, dealt with a case

where an offer was not sent by post, but the secretary of a building society handed to the plaintiff, on July 1, at Liverpool, a written refusal "of the Flamank street property at 750 pounds for fourteen days." July 8 the Land Company got an offer of 760 pounds for this property, and the secretary, between 12 and 1 o'clock on that day, posted a letter addressed to the plaintiff at Birkenhead withdrawing the previous option. This was delivered to the plaintiff's address between 5 and 6 o'clock that evening, but he was out, and it first reached his hands about 8 o'clock. In the meantime, at 3.50 p. m. the same day, the plaintiff by his solicitor at Birkenhead, had posted an unconditional acceptance of the offer, addressed to the secretary, which acceptance was received the next morning. An action for specific performance of the contract was brought, and the principal opinion by the late gifted Lord Herschell, whose sudden and lamented death in this country is so recent, is a model of lucid reasoning and a complete review of the English authorities to its date. The conclusion is reached that an offer need not be made by post in order to constitute the post office the agent of the offerer to receive the reply. Lord Herschell states the rule thus: "Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted."

Professor E. T. Holland, in his "Elements of Jurisprudence" (8th ed., p. 237-39), compares the doctrine of various European codes and nations on the subject, exhibits the English rule as above indicated, and shows that upon the Continent views are by no means unanimous.

To turn to the American decisions—

In 1822 the Supreme Court of Massachusetts, in *McCulloch v. The Eagle Ins. Co.*, 1 Pick. 278, decided that where an offer to insure property was posted January 1, and followed by a letter retracting the offer on the second, although the reply accepting the offer of January 1 was posted before the retraction was received, there was no contract. Chief Justice Parker holds the "treaty open" until the accepting letter was received

by the company, and prior to that the company withdrew its offer.

So that thus early the Massachusetts court, under the lead of its great chief justice, put itself in conflict with the doctrine of the English court.

In 1830 the Court of Errors of New York decided the case of *Mactier's Admr. v. Frith*, 6 Wend. 103, holding that an offer to sell a cargo of brandy having been sent from Santo Domingo to New York and having been accepted by a letter posted at New York on a certain day, the posting of the letter of acceptance closed the contract, and the death of the acceptor, before his letter reached its destination, did not alter its effect. The opinions rest expressly on *Adams v. Lindsell*, *supra*, and Mr. Justice Marcy reviews and contrasts that decision with the conclusion of the Massachusetts court, and testing them by "reason and the practical results that are likely to flow from them," strongly adheres to the English authority.

In 1849 the Supreme Court of the United States (*Taylor v. Merchants' F. Ins. Co.*, 9 How. 390) passed upon the case of a gentleman named Tayloe, who had obtained a proposition by post, from an insurance company, to insure his dwelling on certain terms. The letter reached Mr. Tayloe December 20, and on the next day he accepted by posting a letter to that effect and enclosing his check for the premium, as agreed. A day later, and before his letter had reached its address, a great part of the dwelling was consumed by fire, and the company later refused, on receipt of his letter, to accept the premium or issue the policy. It was held that the contract was complete the moment Mr. Tayloe mailed his letter of acceptance, and the cases of *Adams v. Lindsell*, 1 B. & A. 681, and *Mactier v. Frith*, 6 Wend. 103, are quoted and adopted in Mr. Justice Nelson's extended and valuable opinion.

In 1893 the Supreme Court of the United States, in *Patrick v. Brennan*, 13 S. C. R. 811, quoted at length from *Taylor v. Ins. Co.*, *supra*, and fully approved its doctrine on the above subject, finding authorities abundant to support it and citing with like approval the kindred English and American cases.

The Court of Appeals of New York, in 1867, in *Trevor v.*

Wood, 36 N. Y. 307, held, "Where the offer is by letter or by telegram, the acceptance signified in the same manner is sufficient, irrespective of the time when it comes to the knowledge of the proposing party." The court cites no case dealing with acceptance by telegram but relies on the principles applied to letters by post as entirely analagous.

Attention is there called to the fact that in *Mactier v. Frith*, 6 Wend. 103, the letter of acceptance was not sent by public post, as "it was to go from New York to Jacmel, in the island of Santo Domingo, between which places no communication was had at that time by mail."

Many other cases are collected and the whole subject admirably reviewed under the title "Letters" and sub-title "Contract," 13 Am. & Eng. Enc. of Law, pp. 233 to 236.

Professor Harriman, in his thoughtful and thorough little hand-book on "Contracts," after calling attention to the English doctrine on this subject, on page 94 says: "The same rule prevails throughout the United States with the exception of Massachusetts, where an early case laid down the doctrine that an actual communication of an acceptance is necessary to complete the contract. There has been much artificial reasoning on this point caused by a desire on the part of judges and text writers to make every case harmonize with the subjective, consensual theory of contract, that there must be a meeting of minds to constitute a contract. It would seem as if the simple and straightforward reasoning of Lord Herschell in *Henthorn v. Fraser*, the latest English case on this point, ought to sweep away the fog which has so long obscured this simple though important question."

He points out that in Alabama the doctrine prevails that when an offer and due acceptance are both sent by mail the contract becomes binding as of the date of the offer, but he deems this a mere judicial vagary. Mr. Harriman had the sagacity and felicity to point out in 1896 that there seemed little doubt that the peculiar doctrine of Massachusetts would be overruled in that State (Harriman on Contracts, p. 94, note), resting his prediction upon *Bishop v. Eaton*, 161 Mass. 496, which, though inconsistent with the earlier cases, did not review them and discussed the subject rather slightly. His

prediction seems fulfilled in *Brauer v. Shaw*, 168 Mass. 198, decided March 29, 1897. The facts in that case were as follows: Defendants telegraphed at 11.30 a. m. to plaintiff with regard to shipment of cattle by ocean steamer, "subject prompt reply will let you May space fifty-two six." This was received in New York at 12.16, and at 12.28 a reply was sent accepting the offer. For some reason this was not received by defendant until 1.20. At one o'clock, the defendants telegraphed, revoking their offer and this message was received at 1.43. The court seems to hold the contract completed the moment the acceptance was delivered to the telegraph company and that the message withdrawing the offer was ineffective until it reached the other party and was therefore too late. Judge Holmes, for the court, declines to follow the contrary suggestion in *McCulloch v. Eagle Ins. Co.*, 1 Pick. 278, and prefers the rule stated in the above English cases and by the Supreme Court of the United States.

Harriman says: "Where the parties have agreed to transact business by telegraph, the contract is completed as soon as the offer is delivered to the telegraph company." Again Professor Harriman (Harriman on Cont., p. 95) observes, "Since the contract is complete when the letter of acceptance is posted, the subsequent fate of the letter is of no consequence."

Sir F. Pollock thinks that Lord Cottenham, in *Dunlop v. Higgins*, 1 H. L. Cases 381, "seems to have thought the contract was absolutely concluded by the posting of the acceptance (within the prescribed or a reasonable time) and that it mattered not what became of the letter afterwards. It appears to have been so understood in *Duncan v. Topham*, 8 C. B. 225, where, however, discussion was on other grounds." (Pollock on Cont., p. 641.)

Professor Langdell thinks the communication of the acceptance to the offerer is necessary, and until this occurs no contract is made. He says, Langdell Sum. Law Contracts, Section 14, in case of contracts *inter præsentes* the words or signs must be both heard or seen, in contracts *inter absentes* the letter must be received and read. His principal and almost only authority for this view is a case decided in 1813 by the Court of Cassation in France, namely, *S. v. F.*

D. and others (reported in *Merlin de Jurisprudence, Tit. Vente, I, Art. 111, No. XI, bis.*), which may be more conveniently found in Langdell's Cases on Contracts, 156-60, and is reprinted by Professor Langdell's permission in 1 Keener's Cases on Cont., 149, where the able and ingenious but almost fanciful argument of Merlin covers six pages, the decree in his favor three lines and a half. Merlin quotes extensively from the pundits of the civil law to support the proposition that a letter of acceptance may be revoked at any time before it comes to the knowledge of the offerer, and he says, "Now it is an elementary maxim that I can recall my agent so long as he has not executed his mandate." "I can therefore recall the letter which I have addressed to you so long as it has not reached you, so long as it has not brought to you the words which I had given it in charge for you."

He puts the case of a deaf person who offers you goods at a fixed price. You reply that you will take them. He answers that he cannot hear and prays that you will write your answer. You write to him, "I said I would, but on further reflection your proposition is not satisfactory." Merlin urges no one could pretend that you were bound by your spoken acceptance so unheard by the offerer. He also puts the case of one with an acoustic vault with speaking tubes which delay a message spoken in them five minutes. An offer is made by the owner, and the reply accepting is spoken into his speaking tube, but, before the five minutes pass requisite for it to reach his ear, the acceptor countermands it by running to him and speaking directly to him, and he urges that it could not be claimed that the first acceptance in such case bound.

It is submitted that though this reasoning is most ingenious and the situation described perhaps somewhat puzzling, yet, in the matter of treating a letter of acceptance duly mailed, according to the terms of the offer or custom of business in contemplation of the parties, as an agent who has not executed the mandate of his principal he somewhat evades the question.

The courts of England and America have so far taken a different view and, treating the post as the agent of the offerer duly authorized to receive the reply, treat the reply as in the

offerer's hands as soon as it is in the hands of his agent and that its subsequent loss, delay or miscarriage can have no effect upon the contract, which was consummated at that moment, any more than any other act or omission on the part of one party to a contract, or his agent, except as the other party assents thereto or avails himself thereof. If the suggestion of Professor Langdell that the letter of acceptance must be received *and read* to complete the contract be adopted, a most inconvenient element of uncertainty would be introduced and an acceptance by writing would always be ineffectual until the acceptor's voluntary act, namely, his reading it, operated in turn as an acceptance of the acceptance. If this is requisite then it must be pleaded and proved in all cases involving such a transaction unless it may be presumed from the proper mailing, even then it may be denied and put in issue and the receipt of the letter by the offerer is of no avail until he sees fit to read the acceptance. The acceptor has no means of knowing this, and cannot, during a length of time, treat the contract as complete. It is submitted, with deference, that the practice of business men is quite the reverse and the rule holding a sale complete on delivery of goods to a common carrier, addressed to the buyer and in accord with his order, strongly supports the view that the acceptance, being posted, closes the contract. If such goods are thereafter destroyed, the loss falls on the consignee, not the consignor. Lord Cottenham, in *Dunlop v. Higgins*, 1 H. L. C. 381, compared the letter of acceptance to one containing notice of dishonor of a bill of exchange. "Whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post office he is not responsible." This with the accompanying discussion has often been considered as a mere dictum, but in *Household Ins. Co. v. Grant*, L. R. 4 Exch. D. 216, the Court of Appeal speaking through Thesiger, L. J., held that this doctrine was a *ratio decidendi* in the above decision and so binding upon the English courts, and the majority of the court there hold that an acceptance duly posted binds the offerer whether or not it ever comes to his hand.

Bramwell filed a very vigorous dissent and Sir F. Pollock

most eminent of English legal scholars, regrets that this dissenting opinion did not prevail, although he holds that the result must be taken as final. (Pollock on Contracts, p. 36.)

A like conclusion had been long before reached by the Court of Appeals of New York in *Vassar v. Camp*, 11 N. Y. 441, decided in 1854, where it was held that merchants at Sackett's Harbor, having forwarded by post to a brewer at Poughkeepsie a proposed contract signed by the former in duplicate, for purchase and sale of barley, and the brewer having promptly signed the contract and deposited one of the duplicates so signed in the post office at Poughkeepsie, properly directed to the merchant, that consummated the contract and it was obligatory on the merchants whether they received it or not.

The Supreme Court of Wisconsin, in *Washburn v. Fletcher*, 42 Wis. 152, in 1877 fully adopted the doctrines of the above New York case and held the law well settled in England and this country as there announced.

If the person making the offer fears he may suffer any hardship under this rule, he can adequately protect himself by providing that unless the acceptance reaches his personal knowledge within a fixed time, the same shall have no effect. (Pollock on Cont., *36.) If the rule contended for by Merlin and Professor Langdell were sustained there would be no equally simple and convenient way for the acceptor to protect himself.

In a rule of this sort, so largely affecting commercial transactions, perhaps clearness, certainty and uniformity are more to be desired than perfect accord with the theory of the meeting of the minds in contracts and perhaps, if either should yield, it is rather this theory than the convenience of commerce.

In the judgment of the majority of the able judges who have considered the rule it is not in conflict with the elementary requirement as to contracts. (See opinion Thesiger, L. J., in *Household F. & C. Ins. Co. v. Grant*, L. R., 4 Exch. 216.)

He fully admits the hardship of the rule in some cases, but points out the far more mischievous consequences of the opposite rule.

The acceptance, of course, will not be consummated by mailing an unstamped letter: *Blake v. Hamburg-Bremen F. I. Co.*, 35 Albany L. J. 82; *Britton v. Philips*, 24 How. Pr. 111. And the question of what is such a mailing as will close the contract was quite fully examined by Mr. Justice Cozzens-Hardy in November last in the Court of Appeals, Chancery Division. See *London & N. Bank, In Re, Jones* ex parte*, 69 L. J. Ch. 24; 81 L. T. 512. In that case a letter of allotment of shares was proved to have been delivered at the general post office at 7.30 a. m., by handing the same to a postman met at the entrance of the post office, with a small fee, on his offer to take the same. This letter, however, bore a post mark showing its posting at 11.30 a. m. At 8.30 a. m. a letter withdrawing the offer to subscribe for shares was delivered at the company's office and opened by its secretary at 9.30. It was shown by the postal regulations the postman was prohibited from taking charge of letters. It was decided that, although it is the settled law that an offer is to be deemed accepted when the letter containing the acceptance is posted, and no delay on the part of the post office in delivering the letter will be material, yet, a town postman is not an agent of the post office to receive letters and consequently the delivery to him of a letter of acceptance of an application for allotment of shares will not, for the purpose of fixing the time of the acceptance, be regarded by the court as a posting of the letter.

I add one comparatively late case showing the effect, in construing a contract, produced by the above rule that a contract is made, not by the offer but by the acceptance, and so at the place the acceptance is mailed. In 1898 in *Zeltner v. Irwin*, 49 N. Y. Sup. 337, it was held that the advertising circulars of a stock broker, setting out the advantages of certain methods of dealing and the facilities of the broker, was no such offer as to make the mailing of a letter to him with funds for investment an acceptance. That this letter itself was an offer to contract and if the broker mailed back his acceptance from Pittsburg, Pa., it was this second letter which consummated the contract. Therefore the place of the mailing of this last letter determined the place where the contract was made, and so the law which governed it. That therefore the contract

above must be governed by the laws of Pennsylvania. It was admitted such a contract was void by New York statutes, but urged that there was no proof that it contravened the Pennsylvania law. The court held that, in the absence of proof, the Pennsylvania law would be presumed to be the common law, which did not invalidate a wagering contract and that this contract, being a Pennsylvania contract, therefore was good where it was made and so binding everywhere.

See this doctrine upheld : 7 Am. & Eng. Enc. Law (2d ed.), p. 136, citing *Cowan v. O'Connor*, 20 Q. B. Div. 640, the full syllabus of which is as follows : An order to make certain bets having been telegraphed by postal telegraph from the plaintiff, without the city of London, to the defendant within it, he telegraphed from the city that the order had been obeyed. Held, that the contract of agency was made in the city and that an action for the breach of such contract was within the jurisdiction of the Lord Mayor's Court.

Among the many interesting discussions of this subject two of especial interest are found in 7 Am. Law Review, 433 ; 8 Am. Law Review, 182.

If the doctrine is taken as settled, as it seems to be in both England and America, that one who makes an offer under such conditions that an answer by post or telegraph is to be contemplated, is bound by the acceptance the moment it is delivered to the postal or telegraph authorities, whatever the later fate of the message, then everyone making such an unqualified offer, in effect, offers to be bound by such acceptance so delivered, and where parties voluntarily submit themselves to a liability they can not complain of any hardship.

The controversy as to the logic of the English and American rule is perhaps further promoted by the postal regulations of this country, which permit the sender of a letter in many cases, on proper proceedings, to recall his letter after mailing at any time before delivery. However, if the moment of posting consummates the contract, then the subsequent act of one party, it is submitted, can not dissolve it. The acceptor has done that which, the terms of the offer or the customs of business which a court reads into the offer, have indicated would

be sufficient to fix the liability as by an acceptance directly communicated. The offerer in effect says: "Hand your acceptance to the postal authorities, they are my agents to receive it." That being so, on such delivery the offerer is bound. He has received the acceptance. *Facit per alium facit per se.*

Charles Noble Gregory.

*College of Law,
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PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

BANKRUPTCY.

A corporation of New York presented a petition, under the New York Code, for its dissolution and the appointment of a receiver of its property, upon the ground of insolvency; which petition was granted. A creditor of the corporation claimed that this petition amounted to a "general assignment for the benefit of creditors," and was therefore an act of bankruptcy within § 3, a, 4, of the Bankruptcy Act, but the Circuit Court of Appeals, Second Circuit, decided that the proceeding could not possibly be construed to come within the term, "assignment." *In Re Empire Co.*, 98 Fed. 981.

BANKS AND BANKING.

Few questions have occasioned more contradictory theories and decisions by courts than that of a deposit in a savings bank in the name of another. In *Sullivan v. Sullivan*, 56 N. E. 116, the depositor received the following certificate: "A. has deposited in this bank \$2,000 payable to the order of herself, or, in case of her death, to B." After A.'s death B. claimed the money. The Court of Appeals of New York, following its own decisions alone, decided that B. had no right to the fund, as against A.'s administrator, no matter whether B.'s claim were based on contract, gift or trust.

BILLS AND NOTES.

In Pennsylvania the rule, as laid down by *Ross v. Espy*, 66 Pa. 482, would seem to be that the blank indorsement of a negotiable instrument is not such a contract in writing as cannot be altered and varied by parole evidence. In *Bank v. Hoopes*, 98 Fed. 935, Judge Dallas, of the Circuit Court (E. D. Penna.), strongly criticises this decision and the reasoning upon which it is based, and he approves of the opposite rule, adopted by the Federal Courts, as being in accord with principle.

CARRIERS.

The Supreme Court of Ohio has lately been called upon to decide an interesting question on the liability of an express company for the delivery of goods to the wrong person. In *Oskamp v. South. Exp. Co.*, 56 N. E. 13, A., fraudulently assuming the name of B., a reputable merchant in his town, ordered goods from C. in another town, by mail, under the name of B., and C. consigned the goods to the express company, directed to B. On the arrival of the goods A., by representing to the agent of the express company that he was B., obtained the goods. In an action by C. against the express company for the false delivery, it was strongly urged on behalf of the defendant that C. had no reason to complain, since the goods were delivered to the actual person to whom C. had consigned them, even though he was mistaken as to the name of that person. The court, however, reversed a judgment for the defendant on the ground that the defendant was under the absolute duty of delivering the goods to B., and to no other person.

CONSTITUTIONAL LAW.

The Court of Appeals of New York has affirmed the decision of the Supreme Court of that state in *People v. School Board*, 61 N. Y. Suppl. 330, to the effect that the Constitution of New York (Art. 9, § 1), providing for a system of free public schools wherein all the children of the state may be educated, is not violated by an act establishing separate schools for white and colored children, since the object of the constitutional provision is only to secure equal facilities for each class: *People v. School Board*, 56 N. E. 81.

CONTRACTS.

In *Scott v. Pub. Co.*, 62 N. Y. Suppl. 609, the Supreme Court of New York gave a reasonable construction of a contract with an advertising solicitor. The contract provided that he should receive a percentage on all contracts and also "on all business that followed the original contracts." The solicitor, having been discharged, brought an action for his commissions on contracts received, after his discharge, from customers whom he had originally secured. *Held*, that the last clause of the contract must be construed as referring only to contracts secured during plaintiff's employment, since it evidently showed that the plaintiff was under the duty of keeping the advertisers secured

CONTRACTS (Continued).

by him in touch with the paper; therefore the plaintiff had no interest in the continuation of the advertisements after his discharge.

CORPORATIONS.

The nature of the relation between a corporation and its stockholders has always raised perplexing questions. One of the latter is presented where a dividend is declared, but before it is paid, the corporation becomes insolvent. In such a case are the stockholders *cestuis que trustent* as to the amount of the dividend, so as to be preferred to the corporation creditors? The Supreme Court of New Hampshire has decided in favor of the view that the dividend must not only be declared, but it must be actually set apart for payment, before the trust relation is raised; otherwise the stockholder occupies the position of a mere creditor in respect to the dividend: *Hunt v. O'Shea*, 45 Atl. 480.

COURTS.

A statute of Montana (Comp. Laws, 128, § 460) provides that where the trustees of any corporation fail to advertise or file of record reports of the financial condition of the corporation, they shall be jointly and severally liable for the debts of the corporation. In an action against one of the trustees to enforce this liability, it was objected that the action was penal in its nature and could not be brought outside of Montana. The Circuit Court (D. Conn.) decided that under the decision in *Huntingdon v. Attrill*, 146 U. S. 676, the action was not penal, but merely remedial, therefore the Circuit Court had jurisdiction: *Davis v. Mills*, 99 Fed. 39.

DEEDS.

Clark v. Clark, 56 N. E. 82, is one of the many cases to the effect that an actual delivery of a deed to the grantee is not necessary to give validity to the deed. It appeared that the grantor had the deed prepared and gave it to a notary with the instructions to deliver it to the grantee. Before the notary had made the delivery the grantor married, subsequent to which he went to the notary and obtained the deed, saying that he would deliver it, which he did. The Supreme Court of Illinois decided that the grantor's wife was not entitled to dower, on the ground that the delivery to the notary for the purpose of delivery to the grantee was *ipso facto* delivery to the grantee, in the absence of any evidence to show that the grantor intended to retain any control over the deed.

HUSBAND AND WIFE.

In *In Re Tinker*, 99 Feb. 79, a novel effort was made to have adopted the ancient common law conception of the relation between husband and wife. The Bankruptcy Act (§ 17, S. 3) provides that a discharge shall not affect judgment "for a wilful and malicious injury to the person or property of another." The creditor, who had obtained a judgment against the bankrupt for criminal conversation of the creditor's wife, claimed that if this was not a judgment for an injury to his "person," it was at least one for an injury to his "property." The District Court (S. D. N. Y.), however, refused to take this view and discharged the bankrupt from the judgment.

INSURANCE.

The Civil Code of Georgia (§ 2114) provides that "An insurance on life is a contract by which the insurer, for a stipulated sum, engages to pay a certain amount of money if another dies within the time limited by the policy. The life may be that of the assured or of another in whose continuance the assured has an interest." In *Union Fraternal League v. Walton*, 34 S. E. 317, the Supreme Court of Georgia naturally decided that the above provision only affirms the common law rule that the doctrine of insurable interest applies only where one takes out a policy on the life of another, and it does not limit a person who insures his own life in the choice of the beneficiary. Curiously enough, Lumpkin, J., dissented on the ground that the term "assured" in the Code was synonymous with "beneficiary," so that in all cases the beneficiary must have an insurable interest in the life of the person who insures his own life.

MORTGAGES.

"Can a mortgagor, who has planted crops that have become subject to the lien of a prior mortgage on the land, constructively sever the crop before it matures or ripens, by merely executing and delivering a bill of sale of the uncut crop to a third party, so as to defeat the mortgagee's or the purchaser's right to claim the crop after he has purchased the land at a foreclosure sale made before the actual physical severance of the crop?" This question is answered in the negative by the Court of Appeals of Maryland in *Wootton v. White*, 44 Atl. 1026, but it will be observed that the decision does not cover the case where the crop is severed and delivered prior to the foreclosure sale.

NEGLIGENCE.

Citizens' St. Rwy. v. Hoffbauer, 56 N. E. 54, decides a comparatively new point on the subject of electric railways. As is well known, it is customary, on double-track electric street railways, where the poles are between the tracks, to run the cars on the right hand track, and, where the cars are the open ones used in the summer time, with alighting platforms along the sides, to place a guard rail along the left hand side, in order to prevent the passengers from alighting in a dangerous position. In this case the car, which was running backward, was, unknown to the plaintiff, a passenger, on the left hand track, so that the unguarded platform was toward the line of poles, in the middle of the street. The plaintiff stepped on the platform to obtain a transfer from the conductor, where he was struck by a pole. The Appellate Court of Indiana held that the plaintiff was not guilty of contributory negligence *per se*, since he had a right to assume that the unguarded side of the car was the safe one.

WILLS.

It is well settled that where a confidential agent of the testator draws the will, under which he takes a large benefit, the burden is upon him to prove absence of undue influence. But this rule does not apply where the will in question is made to supersede a former will, the validity of which is not questioned, and where the confidential agent would have received the same benefit under the former will : *Walton's Estate*, 45 Atl. (Pa.) 426.

McDowell's Estate, 45 Atl. 419, is an instance of the extreme length to which courts have gone in overruling particular sentences in wills so as to make them conform to what is thought to be the "general scheme" of the will. Here the testator left his property equally among his children, subject to a life estate in his wife. To the will an undated codicil in these words was added : " In the final division of my estate I desire that the grandchildren shall be taken into consideration and that the estate shall be so divided that the grandchildren shall have equal shares." The Supreme Court of Pennsylvania held that, as the codicil was, presumptively, of the same date as the will, it did not sufficiently appear that the testator meant to disturb the scheme of distribution in the will ; the codicil was therefore held to apply only to those grandchildren whose parents were dead at the death of the life tenant, that is to say, the codicil was treated as of no legal effect.

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IN MEMORIAM.

ROY WILSON WHITE.

On Sunday, May 20, the whole community was shocked to learn of one of the most dastardly crimes which has been perpetrated in Philadelphia. The evening before, while on his way home from his university duties, Roy Wilson White, Fellow of the Department of Law of the University, was attacked by footpads and beaten to death. The motive was robbery. The feeling of gloom among University men at this terrible crime was heightened by the very close relations which Mr. White sustained to the officers, faculty and

students. He had been a student of the Department of Law for three years, and a valued instructor for two more, so that he was intimately known to all connected with this school.

Roy Wilson White was born June 6, 1872, at Richmond, Ind., and was the son of William M. White and Mary White. His father was a school teacher.

His preparatory education was received at various private schools in Adrian, Mich., and Louisville and Spiceland, Ind. His undergraduate college education was received at Earlham College, Richmond, Ind., where both his mother and father had graduated. While at Earlham he was president of the Ionian Literary Society, and won the college oratorical prize in his senior year. He also represented Earlham in 1895 in the intercollegiate oratorical contest at Indianapolis. He graduated in 1894 as a Bachelor of Science, and came east to Haverford College, where he spent a year in post-graduate work in Latin, receiving the degree of Master of Arts.

He then entered the Law Department at Pennsylvania, and from the first showed remarkable ability. He stood among the leaders of his class throughout his course, and took honors all three years, graduating in 1898. He received the Meredith Prize for his graduating essay, entitled "Some Phases of Government Regulations of Contracts."

During his course in the Law School he found time to do a great amount of private tutoring, and was, for the greater part of that time, on the teaching force of the Episcopal Academy, Philadelphia. During his first year he passed the Indiana State Bar examination, and was admitted to that Bar. In 1896 he was chosen alternate for the team that debated with Cornell, and in 1897 was a member of the Pennsylvania debating team.

While in the Law School Mr. White was a member of numerous legal clubs, notably the Sharswood Law Club and the Phi Delta Phi legal fraternity. He was the first president of the Pennsylvania Debating Union.

As a Fellow of the Law School Mr. White was entrusted with a considerable amount of the work of instruction, and fulfilled his duties so satisfactorily that he was commissioned to go abroad last year to study the civil law, and was to have given instruction in that subject during the coming year.

Since he was sixteen years of age he had, together with his brother, been the support of a mother and four sisters.

A glance at the above outline of the brief career of Roy Wilson White will suffice to show that he was a man out of the ordinary, who was destined in any chosen walk of life to stand head and shoulders above his fellows. No better commentary on his character could be penned than the simple narration of his past life and achievements.

Whether he had elected to devote his life to teaching law or to its active practice, he could not have failed to make his mark.

To those who knew him it is needless to speak of his intellect or of his character. As a man he was all that a true man and a good citizen should be. He was not, like most ambitious men, selfish, but

open-handed to all, and self-sacrificing to the last degree for his family and friends. No labor was too arduous for him to undertake for those of whom he was fond. No student ever came to him for help and went away without receiving kind and patient attention and assistance from one who himself hardly knew the meaning of intellectual difficulty.

Roy Wilson White was a man of the purest character and the most exemplary life. He was uncompromising in his stand for what he felt was right, though never offensive to those opposed to his views. By his dropping from the ranks, the community suffers a distinct loss. Such citizens as was he, are too scarce in public life, and the crying need in private life is for men of such character as was his. But more notable is the loss occasioned the University by his death. A foundation had just fairly been laid for a career which must have redounded greatly to the credit of Roy Wilson White and to the honor of the University of Pennsylvania. Sad enough to see the aged professor lay down his life at the end of a career crowded with the fragrance of duty well done, of service to thousands of loyal and loving pupils now gone forth to useful lives. Infinitely more sad to behold a career which promised, and had begun the fulfillment of such a mission—and much more—cut off in the bud. But even the foundation rightly and truly builded stands for something positive, and every friend of Roy White knows that the structure he reared in his short term of building will stand, and stand for a reminder to others that it is worth while to have lived and to have lived aright.

O. J. R.

DANIEL STILZ DOREY.

Mr. Dorey was born in Philadelphia, June 8, 1877, the son of Daniel and Mary Jane Sansom Dorey. He was prepared at Penn Charter and Brown Preparatory School, and entered Pennsylvania in 1895, in the Wharton School. Mr. Dorey then entered the Law Department and took his degree in 1899. He was a member of Phi Delta Theta fraternity, and was business manager of THE AMERICAN LAW REGISTER during 1898-1899. Mr. Dorey died at Colorado Springs, April 9 last.

NEGLIGENCE—LIABILITY FOR CAUSING DEATH—ACTION OF DAMAGES. *Union Traction Company v. Fetters*, 99 Fed. Rep. 214 (1900).

In this case some interesting questions of negligence were brought up before the Circuit Court of Appeals for the Third Circuit, and the Court, per Dallas, J., showed a gratifying tendency to cease making qualifications and exceptions and special rules and to get back to general principles.

The defendant contracted for the construction of a smoke-stack, to consist of a shell of steel lined with brick. When the contractors

for the steel part were near the top those for the brick work commenced work below, upon the assurance of the defendant (their chief engineer, more precisely) that the workmen should be protected from danger from those above by a floor to be constructed above them. Such a floor was constructed, but the defendant, for a temporary purpose, cut a hole through and subsequently a timber, falling from above, passed through the floor and killed the plaintiff's husband, who was a bricklayer working below.

The gist of Judge Dallas' opinion follows: "The refusal of the (lower) court to rule that under all the evidence the plaintiff was not entitled to recover, would perhaps be sufficiently supported if rested upon the ground that the defendant's interference with the platform amounted to such an assumption of direction and control as to preclude it from asserting that the work was done wholly by an independent contractor. *Pender v. Raggs*, 178 Pa. 337 (1896). But our judgment rests upon a broader basis. It is not necessary to hold that the duty of the defendant to exercise reasonable care for the avoidance of injury to the bricklayer resulted from any doctrine which is peculiar to the relation of master and servant, for the general rule that every one is, in his acts and conduct, bound to be duly careful to avoid doing hurt to others was made plainly applicable by the circumstances of this case. Fetters did not go into the stack as a mere volunteer, but upon the invitation of the defendant, and in reliance upon its assurance that a protective platform would be provided to secure his safety. The defendant justified this reliance by erecting a suitable platform; but, having done this, its conceded right to impair the efficiency of the structure, temporarily and for a rightful purpose, was coupled with the duty to restore it to its original condition within a reasonable time after that purpose had been accomplished. The question whether the defendant did or did not discharge this duty and whether, if it did not, the killing of Fetters resulted from its failure to do so, was properly left to the jury for determination."

A few of the cases cited from Bigelow Cas. Torts (1875), Note 708, may properly be inserted at this juncture: *Snow v. Housatonic R. R. Co.*, 8 Allen 441 (1864); *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 586 (1869); *Walsh v. Peet Valve Co.*, 110 Mass. 23 (1872); *Patterson v. Wallace*, 1 Macq. H. L. Cas. 748 (1854); *Bartonskill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266 (1858); *Mellers v. Shaw*, 1 Best & S. 437 (1861); *Ashworth v. Stamvix*, 30 L. J. Q. B. 183 (1861); *O'Byrne v. Barne*, 16 Ct. Sess. Cas. (2d series) 1025 (1854); *Bartonskill Coal Co. v. McGuire*, 3 Macq. H. L. Cas. 300 (1858); *Roberts v. Smith*, 2 Hurl. & N. 213 (1857); *Williams v. Clough*, 3 Hurl. & N. 258 (1858); *Behrens v. G. N. R. R. Co.*, 6 Hurl. & N. 365 (1861); *Grizzle v. Frost*, 3 Fost. & F. 622 (1863); *Skipp v. E. C. R. R. Co.*, 9 Ex. 223 (1853); *Watling v. Oastler*, L. R. 6 Ex. 73 (1871).

Such a decision needs but little comment, the excellence of its reasoning and its wise adherence to first principles is self-sufficient. The decision may be regarded as marking a new line of cases, but, as we said at the outset, it shows a gratifying tendency to get back

to first principles. It does credit alike to the court which uttered it and to the judge who framed it.

NATIONAL BANKS; ASSESSMENT ON STOCKHOLDERS; CONCLUSIVENESS OF COMPTROLLER'S ACTION.—The question of the conclusiveness of assessments levied on stockholders of national banks that have failed, though seemingly well settled, was again brought up in *Aldrich v. Campbell*, 97 Fed. 663, (1899). Campbell was a shareholder in the Tacoma National Bank to the extent of one hundred shares. In December, 1894, the bank closed its doors, and the appellant, Aldrich, was subsequently duly appointed receiver by the Comptroller of the Currency, after the resignation of Anderson, his predecessor in the receivership. In April, 1895, upon a proper accounting, made by the receiver of the bank to the Comptroller, and upon a valuation of the uncollected assets remaining in the receiver's hands, it appeared to the satisfaction of the Comptroller of the Currency that in order to pay the debts of the bank it would be necessary to enforce the individual liability of the stockholders thereof as prescribed by the Revised Statutes of the United States, sections 5151 and 5234. Accordingly an assessment of sixty-five dollars a share was levied upon the stockholders. This assessment Campbell paid. A further assessment of seventeen dollars per share he refused to pay, alleging that there were funds enough in the receiver's hands to pay the bank's liabilities. The receiver then commenced an action at law against him, whereupon he filed this bill in equity, alleging the facts as above stated, and alleging also that he could not interpose these facts in defending the action at law; he concluded by praying for an interlocutory order restraining Aldrich from prosecuting the action. Aldrich filed a demurrer to this bill, which was overruled and Campbell's application granted, whereupon this appeal was taken.

In reversing the lower court, Circuit Judge Morrow said: "It is well established that the Comptroller of the Currency is vested, by virtue of the national banking law, with authority to determine when it is necessary, in winding up the affairs of an insolvent bank, to enforce the liability of the stockholders, and power to levy assessments accordingly; that such determination and any action thereon are conclusive upon the stockholders, and not to be questioned in any litigation that may ensue. *Kennedy v. Gibson*, 8 Wall 498, (1869); *Casey v. Galli*, 94 U. S. 673, (1876); *Bank v. Case*, 99 U. S. 628, (1878); *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, (1887); *Bushnell v. Leland*, 164 U. S. 684, 17 Sup. Ct. 209, (1897); *Bank v. Mathews*, 29 C. C. A. 491, 85 Fed. 934, (1898); *Nead v. Wall*, 70 Fed. 806 (1895); *Young v. Wempe*, 46 Fed. 354, (1891); *Welles v. Stout*, 38 Fed. 67, (1889); *Aldrich v. Yates*, 95 Fed. 78, (1899)."

In *Kennedy v. Gibson*, *supra*, at page 505, it was said by Justice Swayne, speaking for the court, "It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether a whole or a part,

and if only a part, how much shall be collected. These questions are referred to his judgment and discretion; and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him." This case was decided in 1869, shortly of the passage of the national banking laws, and has been followed in every case since that time.

"The appellee in the present case does not deny the authority of the Comptroller as declared by the above decisions, but he seeks to avoid the effect of such authority by contending that while, in an action on the part of a receiver of a national bank to recover an assessment, no defence can be interposed by the stockholder to such an action, however excessive and wrongful the assessment may be, nevertheless the stockholder in such a case may restrain the receiver by a bill in equity to enjoin such action. In support of this contention he relies upon an observation of Mr. Justice Swayne in delivering the opinion in *U.S. v. Knox*, 102 U.S. 422, (1880). 'Although assessments made by the Comptroller, under the circumstances of first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction.'"

The court disposes of this contention by pointing out, first, that the Supreme Court of the United States in this case said that nothing in their opinion was intended to affect the authority of *Kennedy v. Gibson* and *Casey v. Galli*, which they distinctly affirmed; secondly, that the stockholders in the *Knox* case were some of them insolvent, and that to levy a second assessment would be to make the solvent stockholders liable for the insolvent, a liability distinctly repudiated by the Revised Statutes of the United States. "This last statement, as to what a court of equity would do, was limited to the facts of that case (the *Knox* case), and clearly ought not to be extended to facts of a wholly different character."

While the court here very clearly distinguishes Justice Swayne's dicta, yet the Supreme Court of the United States has never touched upon it. It might be that in a particular, though perhaps isolated case, the Comptroller might exceed his lawful rights and authority, it would then be hard indeed were any court to hold that equity could not review his decision. In our opinion equity would do so. We do not mean by this to criticise the decision in the case at bar, for upon all the facts it was well considered and ably rendered.

BANKRUPTCY; "FIDUCIARY CAPACITY" AND "MISAPPROPRIATION."—The case of in *Re Basch* (November, 1899), 97 Fed. 761, deciding that a debt owed by a commission merchant to his principal for goods consigned to be sold on commission, is not a debt created by "fraud, misappropriation or defalcation, or while

acting in a fiduciary capacity," within § 17 of the Bankrupt Act, disposed in a summary manner of a point which was a fruitful source of discussion under the Acts of 1841 and 1867.

Under the present Act the only new question which can arise is as to the meaning of the word "misappropriation"; for the interpretation of the words "fraud" and "fiduciary capacity" must be regarded as having been definitely settled under both of the prior Acts. *Chapman v. Forsyth*, 2 How. 202 (1844), construing the Act of 1841, decided that "fiduciary capacity" included only technical trusts; and that the debt of a cotton factor to his principal was released by a discharge. The Act of 1867, § 34, dealing with discharges, did not enumerate specific trusts, as did the Act of 1841, but its phraseology was almost identical with § 17, subdiv. 4, of the present Act. This portion of the Act of 1867 was disposed of in *Hennequin v. Clews*, 111 U. S., 676 (1883), wherein it was held that damages arising from the conversion by a pledgee of the property pledged to him, did not constitute a debt created by "fraud" or by one "while acting in a fiduciary character." In view of the similarity between the last and the present Acts this ruling, it seems, should be final.

In construing the word "misappropriation" in *Re Basch* the Court said, "the term 'misappropriation' in the present Act is even less appropriate to the transaction sued on than the term 'fiduciary capacity'; and the reasoning in the cases cited [*Chapman v. Forsyth*; *Hennequin v. Clews*, *supra*; *Neal v. Clark*, 95 U. S. 704 (1877)] that excludes the latter, excludes the former also."

Neal v. Clark decided that in the Act of 1867, "fraud" meant positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, or fraud in law. The ruling was based upon the fact that it was grouped with the words "defalcation" and "embezzlement," and that they all referred to kindred acts.

Although the decision in the present case cannot be considered as final, and it is not unlikely that there will by a variety of adjudications on the same point, yet as in *Re Basch* follows in the light of the strong judicial reasoning enunciated in the Supreme Court, it seems that it ought to stand.

BOOK REVIEW.

CHRISTIAN SCIENCE. By WILLIAM A. PURRINGTON. New York : E. B. Treat & Co. 1900.

One of the most interesting books we have ever read has recently been issued by Treat & Co., of New York. It is Mr. Purrington's "Exposition" of "Christian Science," with the sub-title of "A Plea for Children and Other Helpless Sick." Before considering this collection of essays let us ascertain what is meant by Christian Science, using for data the quotations given in the "Exposition." It appears then that Mrs. Eddy's "Science" is based on the threadbare philosophical theory that nothing exists but mind. This is her statement of this familiar and impractical idea: "Disease is an impression originating in the unconscious mortal mind, and becoming at length a conscious belief that the body or matter suffers, . . . a growth of illusion springing from a seed of thought, either your own thought or another's.*" Acting upon this idealistic theory, her treatment of disease is as follows (we quote Mr. Purrington)†: "First of all, buy Mrs. Eddy's books and have the patient do so . . . Next, deny that there is any disease, and make the patient agree with you. 'Remember that all is mind and there is no matter. You are only seeing or feeling a belief, whether it be cancer, deformity, consumption, or fracture that you deal with.‡' Having thus established that the disease does not exist, you next proceed to 'meet the incipient stage of disease with such powerful eloquence as a Congressman would employ to defeat the passage of an inhuman law'§ Further, "If you only address the disease mentally and speak the truth to it, 'tumors, ulcers, tubercles, inflammation, pains and deformed backs . . . all dream shadows, dark images of mortal thought, will flee before the light.'|| This then appears to be the kernel of the so-called "Christian Science." How reverent its Christianity is, will appear from this quotation from the high-priestess' "Miscellaneous Writings" at pp. 51, 52: "'Are both prayer and drugs necessary to heal?' says the interlocutor, and Mrs. Eddy replies: 'It is difficult to say how much one can do for himself, whose faith is divided between catnip and Christ; but not so difficult to know that if he were to serve one master he could do vastly more.'" To convince the skeptical—if possible—Mrs. Eddy has collected in her "Miscellaneous Writings," various testimonials of cures wrought under her system! The following for its unconscious humor deserves quotation.¶ "A dear little six-year-old boy of my acquaint-

* "Science and Health, with Key to the Scriptures," p. 182.

† "Exposition," p. 21.

‡ "Science and Health," p. 297.

§ Ib. p. 322.

|| Ib. p. 301.

¶ "Miscellaneous Writings," p. 408.

ance was invited by his teacher, with the rest of his class in Kindergarten school, to attend a picnic one afternoon. He did not feel that he wanted to go; seemed dumpish, and, according to mortal belief, was not well; at noon, he said he wanted to go to sleep. His mother took him on her lap and began to read to him from 'Science and Health, with Key to the Scriptures.' *Very soon he expressed a wish to go to the picnic and did go.*"

That any one of ordinary intelligence could believe in such a nonsensical theory as above outlined, seems scarcely credible. And even if they do, it would appear to be no one's else business. However, as Mr. Purrington points out, the case is different when this absurd system is practiced on children, and what is the same thing, on helpless sick from whom physicians are excluded. It is there that the Common Law steps in and in its great wisdom declares that the deluded fool who excludes a physician and endeavors to staunch another's severed artery by arguments such "as a Congressman would employ," is guilty of manslaughter at least. It appears, however, that in some states, under existing statutes, it is impossible to reach similar cases. Some of the medical acts do not apply since the mummerly of the Scientists does not come within the statutory definition of the practice of medicine. These people also claim exemption because they are practicing religion. It is devoutly to be desired that in those jurisdictions where it is impossible under existing law to punish such people for causing the death of another, that means may be devised for that end. The practical difficulty is, of course, that such laws unwisely framed, might give room for criticism as savoring of religious persecution, and thus ensure a cheap martyrdom to the blinded zealots. However, it seems that a law making it a misdemeanor to attempt to cure for recompense without having first been passed by a board of medical examiners would cover the case to the extent of reducing the number of those who live by Christian Science.

E. B. S., Jr.

BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked * will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, S. W. Cor. Thirty-fourth and Chestnut Streets, Philadelphia, Pa.]

COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. Vol. VII.
By SEYMOUR THOMPSON, LL.D. San Francisco: Bancroft-Whitney
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No. 7.

HAS THE SUPREME COURT OF THE UNITED STATES THE CONSTITUTIONAL POWER TO DECLARE VOID AN ACT OF CONGRESS?

The question whether the Supreme Court of the United States has the legal authority to pronounce an act of Congress unconstitutional and void, was, early in the present century, answered by that distinguished tribunal in the affirmative. After the lapse of nearly a century, it may be worth while to enquire whether there are not considerations that justify a reconsideration of the question. Among these considerations we venture to suggest the following:

An act of Congress becomes such only after it has passed both houses, and received the approval of the President, or if the latter does not return it, with his approval or disapproval, within ten days (Sundays excepted) after it has been presented to him, it becomes law in like manner as if he had signed it. Thus each house, in the passage of a law, has a veto upon the other, and the President upon both. The House, and the Senate, and the President, all of whom are

sworn to support the Constitution, having reached a common conclusion, and concurred in the passage of a law, in what clause of the Constitution is the Supreme Court empowered to interpose a judicial veto upon their legislation? Where, in the Constitution, is the judicial power associated with the legislative power, and vested with the final veto? When an act has been passed in the constitutional mode, it should seem, in the absence of express authority, to be beyond the power of the judicial branch of the government to nullify it. The judiciary, it should equally seem, is bound to assume that the Legislature, in passing laws has obeyed the Constitution, and that its legislation is in accord therewith.

Otherwise, if the Supreme Court has a veto upon acts of Congress, and can nullify them whenever a case involving them is brought before the court, then, in the words of Mr. Lincoln, in his first Inaugural Message, "the candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

Chief Justice Marshall, in *Marbury v. Madison*, decided in 1803 (1. Cranch 137), puts, in the Socratic method, the contrary view thus: "If an act of the Legislature, repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?" He holds that it does not. The fallacy involved in the question, however, is, in the assumption that the act of the Legislature in question, is repugnant to the Constitution. On the contrary, in the opinion of both houses of Congress, and in the opinion of the President, it is in accord with, and in pursuance of, the Constitution.

The courts are not required, after the law-making power has spoken, to close their eyes on the Constitution, and see only the law, as the illustrious chief justice, in another part of his opinion, suggests, but they are to consider that the lawmakers have eyes as well as the judges, and have

used them, and that when a law comes before the court, it comes for construction and enforcement, not for the purpose of putting the opinions of judges against the opinions of legislators, as to its constitutionality; and if they are in conflict, to disregard the latter, and to give force and effect to the former. Is the opinion of nine men, composing the Supreme Court, or the opinion of a majority of the nine, infallible? Does the bench act under the impress of greater wisdom, or under a higher sanction than does the Legislature?

No doubt, an act of Congress, which should declare that in treason the testimony of one witness was sufficient to convict, when the Constitution expressly declares that there shall be no conviction unless upon the testimony of two, would not be binding on the courts. An act of that character the courts might disregard, and would have direct authority for so doing in the Constitution itself. For in the few instances of express provisions, like the instance we have cited where the Constitution requires the testimony of two witnesses to convict, in a trial for treason, the judiciary is the immediate department of the government to carry such provisions into effect. In those instances, "the language of the Constitution," to use the words of Chief Justice Marshall himself, "is addressed especially to the courts."

Confessedly, one of the ablest jurists that Pennsylvania has produced, was the late Chief Justice Gibson. He denied the right of the judiciary to pass upon the constitutionality of a Legislative Act, and to declare it void, upon the ground of repugnance. In the case of *Eakin v. Raub* (decided in 1824), 12 Sergeant & Rawle, 330, being then a justice of the Supreme Court of Pennsylvania, he said, in delivering his opinion, "that it is not a little remarkable, that although the right in question has all along been claimed by the judiciary, no judge has ventured to discuss it, except Chief Justice Marshall (in *Marbury v. Madison*), and if the argument of a jurist so distinguished for the strength of his ratiocinative powers be found inconclusive, it may fairly be set down to the weakness of the position which he attempts to defend."

With this preliminary observation, Mr. Justice Gibson

proceeds to examine the question, on the principles of the Constitution, and he reaches the conclusion that "it is the business of the judiciary to interpret the laws, not scan the authority of the lawgiver; and without the latter it cannot take cognizance of a collision between a law and the Constitution. . . . It will not be pretended, that the Legislature has not at least an equal right with the judiciary to put a construction on the Constitution; nor that either of them is infallible; nor that either ought to be required to surrender its judgment to the other. Suppose, then, they differ in opinion as to the constitutionality of a particular law: if the organ whose business it first is to decide on the subject, is not to have its judgment treated with respect, what shall prevent it from securing the preponderance of its opinion by the strong arm of power? . . . I take it, then, the Legislature is entitled to all the deference that is due to the judiciary; that its acts are in no case to be treated as *ipso facto* void, except where they would produce a revolution in the government; and that, to avoid them, requires the act of some tribunal competent under the Constitution (if any such there be), to pass on their validity."

He concludes that the people, in the exercise of the elective franchise, constitute that tribunal. "I am of opinion," he says, "that it rests with the people, in whom full and absolute sovereign power resides, to correct abuses in legislation, by instructing their representatives to repeal the obnoxious act. What is wanting to plenary power in the government, is reserved by the people for their own immediate use; and to redress an infringement of their rights in this respect, would seem to be an accessory of the power thus reserved. It might, perhaps, have been better to vest the power in the judiciary; as it might be expected that its habits of deliberation, and the aid derived from the arguments of counsel, would more frequently lead to accurate conclusions. On the other hand, the judiciary is not infallible: and an error by it would admit of no remedy, but a more distinct expression of the public will, through the extraordinary medium of a convention; whereas an error by the Legislature admits of a remedy by an exertion of the same will, in the ordinary exercise of the right of suf-

frage—a mode better calculated to attain the end, without popular excitement.”

But it is said that the judges are sworn to support the Constitution. So are the legislators. And is it meant that more respect is to be paid to the oaths of the judges than to the oaths of the legislators, or that the oath enlarges the scope of legislative power?

. . . “What I have in view in this inquiry,” said Mr. Justice Gibson in *Eakin v. Raub*, “is the supposed right of the judiciary to interfere in cases where the Constitution is to be carried into effect through the instrumentality of the Legislature, and where that organ must necessarily first decide on the constitutionality of its own act. The oath to support the Constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty . . . But granting it to relate to the official conduct of the judge, as well as every other officer, and not to his political principles, still it must be understood in reference to supporting the Constitution, *only as far as that may be involved in his official duty*; and, consequently, if his official duty does not comprehend an inquiry into the authority of the Legislature, neither does his oath. It is worthy of remark here, that the foundation of every argument in favor of the right of the judiciary, is found at last to be an assumption of the whole ground of dispute. . . . The oath was more probably designed to secure the powers of each of the different branches from being usurped by any of the rest; for instance, to prevent the House of Representatives from enacting itself into a Court of Judicature, or the Supreme Court from attempting to control the Legislature.”

If “the policy of the government upon vital questions” can be brought to naught by the interposition of the judiciary; if its legislative authority, after being duly exercised, perhaps, too, in time of war, when its armies are on the march, and its resources are all needed to support its warlike measures can be challenged and set aside by the decision of a court, in a personal action between John Doe

and Richard Roe, then, the gravest disasters may occur, and the stability of the national edifice may be put in the gravest peril. Can we enter upon a foreign war, for example; can we acquire foreign possessions, as we seem inclined to do, and adopt measures for their government, when the success of these operations, civil and military, may be thwarted by a judicial decision in favor of Richard Roe, upon a question of taxes, for instance,—the decision being based upon the unconstitutionality of an act of Congress in the premises! In view of such contingencies, may not the time have arrived when the powers of the Supreme Court should be carefully re-examined, and, if found necessary, be more strictly defined by a Constitutional amendment?

Even those who assert the power of the courts—Federal and State—"to scan the authority of the lawgiver" must admit that the frequency with which it is exercised has become matter for serious reflection, and grave concern. The late venerable Chief Justice Tilghman, who agreed with the doctrine declared in *Marbury v. Madison*, nevertheless in *Eakin v. Raub*, delivered this admonition, namely, that "the utmost deference is due to the opinion of the Legislature—so great, indeed, that a judge would be unpardonable, who, in a doubtful case should declare a law to be void."

Instead of this deference on the part of the courts, how often do we find them exhibiting the refinements of metaphysical reasoning to discover a discrepancy between the law and the Constitution, and, after all, the result only disclosing "a doubtful case" where the law should have been upheld, but, nevertheless, was declared void. In view of this judicial trend, we repeat, may not the time have arrived, when the public interests require an assurance, in constitutional form, that the courts, whether Federal or State, "can exercise no power of supervision over the Legislature, without producing a direct authority for it in the Constitution," Federal or State respectively?

Henry Flanders.

BREACH OF ONE INSTALLMENT OF A DIVISIBLE CONTRACT.

It would be difficult to find any point in commercial law as to which the decisions are so conflicting, uncertain, and unsatisfactory, as the right of a party to a contract to treat a breach of one installment thereof as terminating the contract, and freeing him from his further obligations thereunder.¹

This uncertainty resulted not from an absence but rather from an excess of judicial discussions and opinions upon the subject. It is a subject obscure, less by reason of its inherent difficulty, than from the accumulation of learning upon the subject. It is submitted that much of this confusion has resulted from ascribing an unnecessary, undue and unwarranted effect to the form of the contract—from treating such contracts as things apart from ordinary commercial contracts, and from their form not amenable to the fundamental rules of law governing such contracts.

Three primary questions present themselves: (1) What is meant by the word "divisible" as properly applied to mercantile contracts?

2. What are the fundamental rules of law to which all commercial contracts are subject, unless from their form divisible contracts are an exception?

3. How far does the divisible form of such contracts require a modification of these rules?

This article deals with contracts divisible in the primary sense of the word, *i. e.*, one in which a merchant undertakes to deliver merchandise of a certain amount during a certain time, the deliveries to be made by installments, each of a definite amount, deliverable at or within a definite time, and

¹This is generally spoken of as the right to rescind. The word would appear inaccurate as indicating a mutual agreement to abrogate the contract. See Lord Bramwell, in *Honok v. Muller*, L. R. 7 Q. B. D. 99. "The party to a contract so broken has the right, not to rescind the contract, for rescission is the act of both parties, but a right to declare he will not perform a part only of his contract."

each installment to earn a proportionate payment upon its delivery. The contract is entire, in the sense that it is one contract for the entire amount. No one installment is sold by itself, but only as a part of the whole; no payment is made save as a step towards the payment of the whole. Such a contract is not a divided contract; it is not a group of contracts as to each installment, each to be performed without relation to each other, and only included in the one instrument for the sake of convenience.

It is, however, divisible—liable to be divided—though until so severed it is entire; each portion when performed, as required by the contract, is severed by its execution from the residue still remaining unperformed and executory. The rights of both parties as to that part are then fixed and cannot be affected by any future breach, by any thing subsequently done, or left undone. Each part as executed is, as it were, sloughed off from the still living executory contract.¹

And this because from the form of the contract, from the usual clauses and terms of such contracts, such appears to be the intent of the parties, an intent easily discerned by the application of the ordinary rules of construction common to all commercial contracts.

There is another and secondary use of the term as denoting contracts where the performance on one or both sides is to be entire, but where the compensation is computed not as a lump sum, but by the unit of the thing sold, as at so much a ton of coal or iron, bushel of wheat, etc. Such contracts are not divisible in the true sense at all. They would perhaps be best termed appportional contracts. The only effect of such mode of computing the consideration is to furnish a convenient standard for the ascertainment of the value of an imperfect performance accepted and retained.²

¹ Finch, J., in *Pope v. Porter*, 162 N. Y., 366. "The contract is *divisible in the sense in which that word is applied to cases of a particular character and depending upon particular circumstances*. If the plaintiff had completed the March delivery, and the defendant had accepted it, they would be bound to pay for it, irrespective of any possible or actual default thereafter as to the April delivery. But this is because of a part delivery on one side and part performance on the other, which is in accordance with the contract and permitted by its terms."

² It is the purpose of this article to treat only of divisible contracts in the

All commercial contracts may be said to be subject to certain fundamental rules, which are modified only within very narrow limits, and then only where the subject matter or the form of the contract renders such modification absolutely necessary.

1. All stipulations in mercantile contracts upon either side, as to time and mode of performance, are to be regarded as material and essential. Merchants are supposed to be capable of managing their own affairs, and are to be regarded as the best judges of what they wish to obtain.

The Court will not inquire why the stipulation is inserted, or how far a failure to comply with it will affect the value of the performance tendered. It is enough that it is inserted, its presence proves it to be essential. It is not a question for the Court "whether there is a contract which bears upon its face some reason, some explanation why it was made in that form and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract and merchants are not in the habit of placing upon their contracts stipulations to which they attach no importance." (Cairns, L. C.; *Bowes v. Shand*, L. R., 2 App. Cases, p. 463.)

2. A full and exact performance in accordance with the terms of the contract must be tendered before there is any obligation to accept such tender. The Court will not consider the relative value of the thing offered and that stipulated for. It will not balance the benefits to the one against the losses of the other. Certainty is the one great essential; each party must know, and know from an inspection of the contract itself, what he must offer, and what he is bound to accept. The Court will not consider the hardship of allowing a slight divergence to vitiate the tender of an apparently substantial performance. The loss to the one, by holding the tender bad, may be out of all proportion to the damage done the other by the divergence; but this is a matter for the parties to consider, when they insert the stipulations,

primary meaning of the word. It is as to the rights of a party to such a contract upon a breach by the other, as to one delivery or payment, that so much doubt has arisen, and so many conflicting decisions have been rendered, and opinions expressed by the most learned judges.

not for the Courts to remedy afterwards. It is not for the Courts to protect the parties from the results of improvident contracts, but to enforce strictly obligations assumed by themselves, not imposed by any policy of law. So in *Bowes v. Shand*, supra, where there was a contract to deliver a cargo of rice, to be shipped during the months of March and April, the purchaser was *held* entitled to refuse the entire cargo, because a part had been put on board during February, though there was evidence that rice shipped in February would be the same spring crop, and quite as good as rice shipped in March and April.

Certainty in all cases is of more moment than abstract justice in individual instances. "It is no answer to that literal meaning (*that the rice must be shipped in March and April*) that it puts an additional burden on the seller without a corresponding benefit to the purchaser. That is a matter of which the seller and purchaser are the best judges. The non-fulfillment of a term in a contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term in a contract should not be fulfilled."

Lord Cairns in *Bowes v. Shands*, p. 463.¹ He then goes on to repudiate the idea that a cross action for damages would be a sufficient protection to the rights of a purchaser, and says: "The plaintiff has not launched his case until he has shown that he has tendered the thing contracted for.

Of course no tender need be made unless such tender is a condition precedent to the plaintiff's right to call upon the defendant for the performance of his contract.

What then is meant by the term *condition precedent*?

The whole theory of contracts, not under seal, rests upon the doctrine of consideration—a promise is not binding unless found upon a consideration. It need not be performed until the consideration bargained for has been obtained.

The notes to *Pordage v. Cole*, 1 Wm. Saunders, 326—which is the basis of all the learning upon the subject of condition precedent—laid down five rules, three of which,

¹ This case is followed by the S. C. of the U. S. in *Filley v. Pope*, 115 U. S. 213, and cited, with strong approval, and used as the basis of decision in *Norrington v. Wright*, 115 U. S. 188.

first, second and fifth, deal with the true question of condition precedent; they lay down rules whereby the Courts may ascertain what the parties intended shall be the consideration for their respective promises. If A agrees to perform his share before the time when B is called upon to perform his, the performance by A of such share is the consideration upon which B agrees to perform his, whereas A agrees to perform upon the consideration that B has promised to perform his share. But in either case the party is entitled to his consideration before he need carry out his promise.

If it be the performance, on the other's part, such performance must be tendered. If it be a promise he has received his consideration if the other party has not repudiated such promise, or put it out of his power to perform it. If he has repudiated it the consideration falls. (See case of *Hochster v. De La Tour*, L. R., 2 Ex. 111.)

So if he has put it out of his power to perform it (*Planché v. Coltern*, 8 Bing. 14). In no case can either party be called upon to perform his part when he has obtained nothing but a right of action for damages for a promise already broken. If the two promises are to be performed at the same time neither party is supposed to have relied for his consideration upon the promise of the other. The consideration for each promise is the performance by the other. The performance by both are concurrent conditions to the right of either to demand a performance.

This, then, is the third fundamental rule—a rule of all contracts, not merely of those merchants. No man can be asked to perform his promise till he has obtained the consideration he has bargained to receive in return for his performance.

The third and fourth rules in the notes to *Pordage v. Cole* deal not with the intention of the parties at the time of entering into a contract, but with the effect thereon of a subsequent acceptance, and retention of a performance, not exactly in accordance therewith, but which is none the less a substantial performance.

These rules are deduced from the opinion of Lord Mansfield in the case of *Boone v. Eyre*, cited in *St. Albans v. Shore*: 1 H. Blackstone 273; n. a.

Lord Mansfield's language is as follows: "Where mutual covenants go to the whole of the consideration they are mutual conditions, the one precedent to the other. Where they go to a part only, where the breach may be paid for in damages, the defendant has a remedy on his covenant, and shall not plead it as a condition precedent."

While this language might appear broad enough to include both executory and executed contracts, as a matter of fact the contract had, in this case, been in part executed. An estate in the West Indies had been conveyed—the defendant was endeavoring to escape payment by alleging the failure to transfer all the slaves promised to be delivered.

And in *Campbell v. Jones*, 6 Term, Rep. 570, where the case of *Boone v. Eyre* is cited, Ashhurst, J., is quoted as saying in that case: "There is a difference between executed and executory covenants. Here the covenant was executed in part, and the defendant ought not to keep the estate (without payment), because the plaintiff has not the title to a few negroes."

So we find Mr. Sergeant Williams, further on in his note, stating that it seems that "it must appear on the record that the consideration was in part executed."

So in all cases in which *Boone v. Eyre* has been followed. It has been applied simply to relax the rigor of the old rule that until everything was strictly performed under the contract, there was no right to compensation, even though the substantial portion of the contract had been performed on the one side and accepted and retained on the other. It has never been extended, where the performance is to be entire, and there is no apportionment of the payments, to enable a party to substitute for a tender according to the terms of his contract, one which is substantially similar.

In *St. Albans v. Shore*, 1 H. Blackstone, the defendant was held entitled to refuse to accept title to land though the title was good, because the plaintiff had cut down the timber upon it, he having covenanted to convey it with timber thereon.

The Court, while approving *Boone v. Eyre*, refused to consider whether the timber was the main inducement for the purchase, whether, in other words, an inability to deliver

the timber went to the whole of the consideration, or could be compensated in damages.

Lord Ellenborough saying, "This is not a case where one party has performed his part;" and in the case of *Ellen v. Topp*, 6 Excheq. 444, the Court expressly repudiated any idea that the doctrine of substantial performance could apply to an executory contract.

There, the father having bound his son as an apprentice to learn three trades, refused to pay the penalty for his son failing so to serve, because the plaintiff had, by retiring from one of them, disabled himself from teaching all he agreed to teach.

Pollock, C. B., in regard to *Boone v. Eyre*, said: "It is remarkable under this rule the construction of the instrument may be varied by matter *ex. post facto*, and that which is a condition precedent, while the contract is executory, may cease to be so by the subsequent act of the party in receiving less."¹

The doctrine of *Boone v. Eyre*, then, properly understood, has no relation to executory contracts. It announces no principle of law which in any way makes the Court the judge as to whether a party to a contract need accept less than he bargained for. The parties themselves, in a mercantile contract, are the only judges as to the materiality of their stipulations. Their insertion of a stipulation as to the time and mode of performance, quantity or quality, is conclusive proof that they do regard it as material. Nor can the Courts force upon them the duty to accept anything differing in the most minute detail from that which they

¹ It is suggested that much confusion could have been avoided by adopting the principle stated by Baron Parke in *Mundell v. Steele*, 8 Mees & Welsh 882, "where a contract is made for the purchase of a chattel manufactured in a particular manner, when the party may refuse to receive it, or return it within a reasonable time, if the article is not such as bargained for—the acceptance or non-return of the article affords evidence of a new contract on a *quantum valebet*."

Thus the right to compensation would have been placed beyond dispute, upon the retention of the benefit conferred by an imperfect performance—and no one could have for an instant been misled into the idea that the Court should have the power to force upon a man the necessity of accepting that which he never agreed to accept, because the Court might consider that what was offered might be of some substantial benefit to him of the kind desired.

have contracted for ; but if they do accept less, knowing they will never obtain all ; or if having accepted a part, in the hope of obtaining the rest, they retain that part, after knowledge obtained that such hope is groundless, they by this subsequent acceptance or retention of the benefit of a partial performance, waive the necessity of a full performance as a pre-requisite to recovery.

They have, by their subsequent act, announced that whatever might have been the intention at the time of making the contract, they now consider that an exact performance is not material, but may be compensated in damages. Though they might refuse the tender as imperfect, they may not retain the benefit thereof, and allege as a reason for refusal to pay part a failure to comply with the exact terms of the contract, when by their very act of acceptance and retention, with full knowledge of its imperfection, they have shown they do not regard all the stipulations as of essential importance.

No party to a contract can be forced to perform it unless he receives consideration for his promise ; but if he choose subsequently to accept in lieu of that consideration something different, he must still carry out his agreement.

So here, while the original consideration is the tender of a full performance, he by accepting less substitutes therefor that smaller performance, together with a right of action, for the difference.

The one great basic principle underlying all these rules is that it is the duty of the Court to ascertain from the contract itself the intention of the parties at the time they enter into the contract, and to give effect thereto to enforce such obligations as the parties have intended to assume to protect such rights as they have bargained to obtain. There can be no hardship in enforcing strictly to the letter contractual obligations which are not, as are the obligations of criminal law and the law of torts, imposed upon all persons without their consent for the protection of the good order of the community, and so are to be extended no further than is necessary for such purpose, but which are assumed by the parties by their own consent, voluntarily, with their eyes open to the consequences, and for what they at the time at least consider for their mutual benefit.

The effect of a breach in all contracts where the performance is undivided, is to be determined according to what the contract itself shows that the parties have intended to be the obligations assumed, and the consideration therefor agreed upon—not upon the circumstances surrounding the breach, nor the intention of the party committing it at the time he violates his agreement, no matter how hard his position, how excellent his motive, how sincerely he desires and intends to remedy his defaults as fully and as soon as possible, if he had failed to offer that which the contract shows the other intended to be agreed consideration, he cannot call upon that other to fulfil his portion of the contract.

It is only where the party not in default has accepted and retained a defective performance, and so waived the breach, that the effect of such a breach can be altered by matter subsequent to the making of the contract. No party to a contract can compel the other to accept less than he bargained for, but the other can, by accepting less, waive his right to treat the breach as a termination of the contract.

Such being the rules applicable to all commercial contracts, where the performance is by one act, what effect has been given to the division of performance as modifying them?

The English cases are typical and embodying all the difference of opinion on the subject. In them three divergent positions have been taken upon the question.

That taken by Pollock, C. B., in *Hoare v. Rennie*, 5 H. & N. 19, and followed in *Honck v. Muller*, L. R., 7 Q. B. D. 92, that the stipulations as to division of performance on both sides, do not split the contract into so many contracts as there are installments; but are stipulations as to time and mode of performance of an entire contract, which must be strictly complied with; and that a breach of such a stipulation as to any one installment is a breach of the whole, and terminates so much of the contract as remains executory.¹

¹ Bramwell, L. J., in *Honck v. Muller*: "The mere fact that the performance was divided did not entitle the purchaser who had agreed to accept and pay for 2000 tons of iron, to compel the seller to do what he never agreed to do—deliver 1333 tons of iron, and accept two-thirds of the price, and a right

In *Honck v. Muller*, Lord Bramwell rather elaborates this view, but unfortunately injures his position by a dictum, which he afterwards repudiated in *Mersey v. Naylor*, to the effect that where a part had been performed in accordance with the strict terms of the contract, no subsequent breach could terminate the contract. This is in effect a too broad statement of a doctrine properly applied in *Brandt v. Lawrence*, L. R., 1 Q. B. D. 344, that where one installment has been performed under an unbroken contract, and as a step to the orderly performance thereof, the right to compensation therefor becomes fixed and vested, and cannot be divested or affected by any subsequent default on either side. The part executed has been severed by performance from the executory residue.

This is but giving effect to the intention of the parties as shown by the order of performance provided in the contract. They agree that as each part as performed on one side, it shall be met by a proportionate part performance on the other, in advance of any possibility of knowing it all will ever be completed. So that the consideration for each part performance is an orderly performance of the contract up to that point, and for the future a contract still executory and still unrepudiated.¹

The second is that taken by Lord Blackburn in *Simpson v. Crippen*, L. R., 8 Q. B. 14, and followed and put upon perhaps more logical grounds by Brett, L. J. (afterwards Lord Esher) in his dissenting opinion in *Honck v. Muller*, supra, that a breach as to any one installment will not entitle

of action for the remaining one-third." It is to be noted that the default here is not in a failure to deliver according to contract, but to accept and pay. The whole of this opinion is most instructive. He also gives a homely but striking example. "Suppose a man orders a suit of clothes, the price being £7, four for the coat, two for the trousers, and one for the waistcoat. Can he be made to take the coat alone, whether they are all to be delivered together, or the trousers and waistcoat first?"

¹Of course, a perfect delivery of one installment, accompanied by a repudiation of the residue, would not have to be accepted, for such repudiation would destroy a part of the consideration, i. e., that the part performance shall be offered as a step to performance of the whole. If it is so offered, it must be paid for and the party must trust to their rights under an unrepudiated contract for the completion thereof. He, however, is not bound to accept any one portion standing by itself.

the party aggrieved to terminate the contract, unless the breach cannot be compensated in damages, citing notes to *Pordage v. Cole*.

Evidently he had in mind the doctrine of *Boone v. Eyre*, which, as has been seen, has application only to prevent the retention of a substantial but inaccurate performance without payment, and has no effect to enforce the acceptance by a party to an executory contract of a part only of the agreed consideration, because the Court might happen to think that what is offered, plus damages, might be of equal benefit to him. He is entitled to the thing agreed upon, and cannot be forced to accept anything else, though as good or even better in the opinion of the Court.

Of course, the division of performance renders it easier to compute the damages for a breach of any one portion, but so does the apportionment of price in a contract to deliver one hundred tons of coal at so much a ton, and who would argue that therefore the purchaser must accept fifty tons and damages for the non-delivery of the rest?

If he does accept it, such apportionment of price aids in ascertaining the value of the part performance, but it cannot compel him to accept what he never agreed to buy. Lord Blackburn's view can be supported, either upon the theory that the contract is in fact not one contract, each part having relation to and depending upon every other, but a group of independent contracts, the performance or non-performance of any one having no effect on any other, but entitling the party aggrieved to damage; or, upon the theory which is in effect much the same advanced by Brett, L. J., in *Honck v. Muller*, that while the contract is entire, by the division of performance, the parties have expressed their intention that an action for damages shall be sufficient remedy for a breach of any one installment. These theories are at least intelligible, but it is submitted that the most casual consideration will show them to be erroneous. There are so many and sufficient reasons for the division of performance, so many and valuable objects to be attained thereby that it would seem a mere perversion of reasoning to hold that merchants had adopted such a form for the express purpose of waiving one of the most valuable rights which parties to a contract

can possess—that of going elsewhere to get what they find it impossible to obtain under the contract.

A form of contract apparently particularly appropriate to secure to a purchaser a constant regular supply of goods, without having to purchase and pay for all at once, or to provide a seller, a certain dependable market is construed to amount to an agreement, that both of these are utterly immaterial, and that the parties will willingly buy or sell whatever part the other will deliver, or accept and sue for damages for the rest.

Surely this is not ascertaining and giving effect to the intent of the parties as evidenced by the contract, but an attempt by overlooking the obvious objects of such a form of contract to torture it into an expression of an intention, which will support a view of the law which most nearly accords with the sense of abstract justice of a judge, always perhaps a trifle too susceptible to the hardships, real or imaginary, of individual suitors.

While Lord Justice Brett's theory is open to the criticism that he overlooks the obvious object of this form of contract, in order to extract from it an intention of the parties, which while it defeats the apparent object of this form of contract, seems best designed to effect, will support his view of the justice of the case, it allows the rights of the parties to be governed by their intention so discovered.

The third position taken, on the contrary, ignores the intention of the parties at the time of contracting, and determines the effect of a breach of one installment according to the defaulting party's intention to perform the residue, and to substantially atone for the breach, such intention being evidenced by the circumstances surrounding the breach. Such is the position taken by Lord Coleridge in *Freek v. Burr*, L. R., 9 C. P. 208, L. J. Brett, in *Bloomer v. Bernstein*, L. R., 9 C P. 558, and possibly by the House of Lords in *Mersey v. Naylor*, though the circumstances were so peculiar, and the opinions so inconclusive that it is hardly safe to trust that case as authority beyond its own facts.

Under this rule, the question which must be determined is, Has the party by his default intimated an intention to

refuse to substantially perform the contract as entered into, and so to abandon it, and has the other party accepted such intimation as terminating the contract? In other words, a true rescission by mutual consent, evidenced on the one side by the circumstances and quality of the default, and by the refusal of the other party to continue bound.

The question involves two distinct and most difficult issues of fact. First. Notwithstanding the breach, can the contract still be performed substantially as agreed? Second. From the conduct of the party in default, can there be gathered an intimation of an intention not to make such a substantial performance to perform the residue, and to atone for the breach by as full a performance of the part broken as is still possible?

This rule is open to grave criticism. First. It violates the rule that a party to a contract need only accept that which he bargained for—by applying to executory contracts the doctrine of substantial performance, only applicable to contracts executed, when as in *Boone v. Eyre* a substantial performance has been accepted and retained.

Second. It gives effect not to the intention of the parties as evidenced by the contract, but to the intention of a party in default to atone for his breach as evidenced by his acts and declaration at the time of the breach, and the circumstances attending it.

The rule in *Freeth v. Burr* has, it is submitted, been much misunderstood. It is often taken to be that a default as to any one installment will not terminate the residue of the contract unless it indicates an intention to refuse to perform the residue.

Such a reading of this case makes the contract not divisible, but a group of separate contracts, a breach of any one of which affects any other only, when attended by circumstances amounting to a repudiation, a breach by anticipation of the others. However, the facts were that the seller having been dilatory in his deliveries of one installment, the purchaser assumed the right to retain the money due thereon, to secure himself against further delays. He did not refuse to pay for the installment eventually; in fact, he announced his intention finally to pay all due, under the whole

contract, less damages for delay in deliveries. And Coleridge, J., *held* that the question to be left to the jury was whether the failure to pay evidenced an intention to abandon and altogether refuse performance *of the contract*, "to no longer be bound by the contract," not, it is to be noted, of "the residue of the contract." And he distinguished the case of *Hoare v. Reunie* on the ground that there the Court must have *held* that the failure to perform the one installment entirely destroyed the whole object of the contract; and so, since a substantial performance of the contract as a whole had become impossible the breach evidenced an intention to abandon the contract as entered into, and to renounce all rights under it.¹

So in *Bloomer v. Bernstein*, L. R., 9 C. P. 588, the purchaser having failed to pay a bill of lading for one installment, the seller refused to continue to deliver. Mr. Justice Brett left to the jury the question whether he would have been able to pay at any time during the continuation of the contract, for the bill of lading, unpaid for; not whether he would pay for the other bills of lading when presented, after each future delivery, leaving the seller to an action for damages, for his remedy for the existing failure to pay; and this was by the Court above *held* a proper direction.

So in *ex parte Chalmer*, L. R., 8 Ch. App. 289, the buyer of goods on credit having become insolvent, and one installment being unpaid for, had no right to demand future deliveries without tendering the price of them in cash, and also the price of the delivery still unpaid for. And lastly, it offends against the whole theory of Commercial Contract Law—a theory based on the necessities of mercantile life, which is that the highest essential is certainly as to contractual rights and obligations, that the contract shall itself show with certainty what each party is bound to do thereunder.

According to this rule a party against whom a default has

¹As a matter of fact this was just what the Court in that case refused to even discuss. They held it immaterial whether the default defeats the object of the contract, or rendered a substantial performance impossible; it was not in accordance with the contract, therefore there could never be a tender under its terms which alone the purchaser had agreed to accept.

been committed as to any one installment, has no other standard by which to measure his rights save a prognosis of the decision of Court and jury as to two most difficult questions of fact. The defaulter's intention to abandon the contract evidenced by the circumstances of the breach, and the possibility of a substantial performance, notwithstanding the breach.

How difficult this is, is best shown by this: that in *Mersey v. Naylor*, Lord Coleridge, who himself was the father of the rule, was reversed by two higher Courts as to these questions of fact. How can a merchant be required to more accurately solve such questions than a judge of such great reputation and familiarity with such points?

Such are the decisions prior to *Mersey v. Naylor*, L. R., 9 App. Cas. 434, decided by the House of Lords, and so binding authority upon all points directly decided thereon.

Francis H. Bohlen.

(To be concluded in next issue.)

A HUNDRED AND TEN YEARS OF THE CONSTITUTION—PART XI.

It will be noticed that the vote in the Virginia Convention was in the proportion of nine to eight in favor of ratification—a very even division. Whether this was the result of the arguments of Mr. Henry and others as to the necessity of a bill of rights and certain amendments as conditions precedent to ratification, or to an unwillingness to enter into a union of a radically different character from the Confederacy, it is not possible to say with certainty. But the strong probability is that the former was the controlling reason for the large negative vote. Of course, there was also the conservative spirit, which makes us often choose to bear the ills we have rather than fly to others that we know not of. The proposed new Government was admittedly an untried experiment. Mr. Madison had frankly told the Convention that it was *sui generis*—that there was not its like to be found in history; and men naturally hesitate to risk their all upon an unknown sea.

Second only to Virginia in importance was Massachusetts. The Convention in that State was held in January, 1788. It was a much larger body than the Virginia Convention, its members numbering about three hundred and fifty. The debates are not as fully or as accurately reported, but there is quite enough to give us a clear idea of the proceedings. There were fewer participants in debate, proportionately, than in Virginia, and there seems to have been less ability displayed. But there is much similarity between the debates in the two Conventions—much the same arguments were used for and against the Constitution. It was resolved at the outset—just as in Virginia—to debate the Constitution section by section; and this resolution, while not perhaps strictly adhered to, was yet much better enforced than in Virginia—possibly owing to the absence of any counter-

part of Patrick Henry, although Messrs. Thompson and Nason were not unlike him. Of course, it was contended by the extreme opponents of the Constitution that it was a scheme for consolidation, which, if adopted, would annihilate the State Governments. But its partly Federal, partly National character seems to have been more generally understood and appreciated than in Virginia. It was quite understood that it was a radical departure from the Articles of Confederation—and the chief and most weighty objection to it was that it might easily become a centralized government, putting the people out of control of their own immediate affairs; and local self-government was one thing which they could not then—and would not now—abandon. Realizing that the new government would act on individuals in many ways, and was intended to do so, they felt that the absence of a bill of rights, and of an express declaration that the new government's powers were to be those granted by the instruments, and *no more*, was for that very reason a serious defect. There was, happily, a strong realization that the interests of all the States were in many ways identical and bound up with each other. General Heath declared freely in the debates that he considered himself not as an inhabitant of Massachusetts, but as a citizen of the United States. The remark was made when the Convention was debating the powers for the biennial election of representatives. Some members considered that the elections should be annual, and Montesquieu was quoted to that effect. To this it was replied by Mr. Davis that the remark applied to "single governments and not to confederated ones," and it was again and again pointed out that as Congress and the other branches of the new government were given certain definitely stated powers and no others, the annihilation of the State Governments was impossible—and, indeed, that, as in many ways, the National Government was dependent upon the States. For example, in the Senate, and even in the House, as its members were to be chosen by those entitled to vote for the more numerous branch of the State Legislatures, the ruin of the State Governments would carry with it the ruin of the National Government, and this, although it was distinctly admitted that it was not a simple Confederacy

which they were framing. Mr. King said, "The introduction to his Constitution is in these words: '*We, the people.*' The language of the Confederation is, '*We, the States.*' The latter is a mere Federal Government of States. Those, therefore, that assemble under it have no power to make laws to apply to the individuals of the States confederated." And Mr. Stillman later quoted with approval the letter of Governor Randolph, in which he points out the impossibility of satisfactorily amending the Articles of Confederation, and the consequent necessity for throwing them aside.

Very strong expressions as to the vital necessity for Union are frequent, and those who did not like the Constitution in many ways voted for it in the end rather than risk disunion. It is doubtful, however, whether the Constitution would have been ratified had it not been for the introduction of certain suggested amendments by Mr. Hancock, the President. I think that if these amendments had been made *conditions precedent* to Massachusetts's adoption of the Constitution, it would have been adopted by a very large majority. The amendments were discussed at length, many of them, and all affirmed. One of the amendments was to the effect that all powers not expressly delegated to Congress are reserved to the States. This Mr. Adams pronounced to be a summary of a bill of rights, and consistent with the second article of the Confederation, as to the retention by each State of its sovereignty, independence, etc. But Mr. Mason was not yet satisfied. He adverted to the preamble of the Constitution, and said if it did not go to the annihilation of the State Governments, and to a perfect consolidation of the whole Union, he did not know what did. He said further: "We are under oath; we have sworn that Massachusetts is a sovereign and independent State. How, then, can we vote for this Constitution, that destroys that sovereignty?"

Colonel Varnum begged to remind him that that very oath provided an exception of the power to be granted to Congress.

The form of ratification which was submitted to the Convention was as follows:

COMMONWEALTH OF MASSACHUSETTS.

IN CONVENTION OF THE DELEGATES OF THE COMMONWEALTH OF MASSACHUSETTS, 1788.

The Convention having impartially discussed and fully considered the Constitution for the United States of America, reported to Congress by the Convention of Delegates from the United States of America, and submitted to us by a resolution of the General Court of the said Commonwealth, passed the twenty-fifth day of October last past; and acknowledging with grateful hearts the goodness of the Supreme Ruler of the Universe in affording the people of the United States, in the course of His providence, an opportunity, deliberately and peaceably, without fraud or surprise, of entering into a solemn compact with each other, by assenting and ratifying a new Constitution, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity, DO, in the name and in behalf of the people of the Commonwealth of Massachusetts, assent to and ratify the said Constitution for the United States of America. And, as it is the opinion of this Convention, that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of the Commonwealth, and more effectually guard against an undue administration of the Federal Government, the Convention do therefore recommend that the following alterations and provisions be introduced into the said Constitution," etc. Then follow nine amendments, only a few of which we need notice. 1. "That it be explicitly declared, that all powers not expressly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised." 3. "That Congress do not exercise the powers vested in them by the fourth section of the first article [to regulate elections], but in cases where a State shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress,

agreeably to the Constitution." 4. The fourth suggested amendment limits the power of Congress to levy direct taxes, except where requisitions have not been complied with. After setting out the amendments, the form of ratification goes on to urge upon the representatives in Congress to use all reasonable and legal methods to secure their adoption. The vote on the question of ratification was, Ayes 187, Noes 168. It is quite an interesting fact that there is a strong local tinge to the vote—the counties of Suffolk and Essex voting almost unanimously "Aye," the county of Worcester voting almost unanimously "No."

It is noticeable here—as in Virginia—that there was no discussion practically as to the bestowal upon the General Government the exclusive exercise of all the highly sovereign powers. The whole people, if their representatives in the Convention were really representative, was, on the one side, absolutely convinced of the necessity of a firm and indissoluble Union, and equally, on the other, of the necessity of a determined stand against centralization.

We have been in the South and in New England; let us go now to the Middle States. The New York Convention assembled at Poughkeepsie in June, 1788. It was a much smaller body than either the Virginia or the Massachusetts Convention, having only about sixty members. Yates, Lansing and Hamilton attended, as did Jay, Chancellor Livingston and several other distinguished and able men. The debates as they come down to us are somewhat fragmentary; but they are very interesting, and show, it seems to me, much more ability than those in Massachusetts. The general question was very fully discussed, and many highly significant things were said. The extreme difficulty of the question—the novel and unprecedented nature of the new Government—appears very clearly, and much cogent argument was forthcoming on both sides. Indeed, after the Convention had been sitting about a week, Mr. Hamilton remarked that it was extremely easy, on each side, to say a number of plausible things, and then laid down with characteristic clearness the following general proposition: "There are two objects in forming systems of government—*safety* for the people, and *energy* in the administration. When these ob-

jects are limited, the certain tendency of the system will be to the public welfare. If the latter object be neglected, the people's security will be as certainly sacrificed as by disregarding the former. Good Constitutions are formed upon a comparison of the liberty of the individual with the strength of governments: if the tone of either be too high, the other will be weakened too much."

After the preliminary work of organization, the Convention resolved itself into a committee of the whole, and Chancellor Livingston took the floor in explanation of the general nature and purpose of the new Constitution and in advocacy of it. He maintained that the Confederation was defective in principle, as it operated upon States in their political capacity, and not upon individuals; that "it carried with it the seeds of domestic violence, and tended ultimately to its dissolution." Also, that a federal republic, as the steward of a league among independent States, had always disappointed its advocates. He was followed next day by Mr. Lansing, one of the opponents of the Constitution in the General Convention, in an able, conservative speech, in which he said that he still was apprehensive that a consolidated government, partaking in a great degree of republican principles, in so extensive a territory, could not alone preserve the essential rights of the people; and that he proposed introducing amendments looking to the preservation of those rights; and all through the debates, this idea was, as elsewhere, the leading principle upon which the opponents of the Constitution relied—they feared centralization. Throughout there is on all sides a realization of the necessity for Union. Throughout there is perfect understanding that the new Constitution differed vitally from the old. Mr. Melancthon Smith, a leading opponent of the Constitution as it came from the General Convention, said that an increase in representation in the House would be a great improvement; it would make that body more truly representative. He said that there were here, as elsewhere, "natural aristocrats"—that is, men whose superior ability and attainments differentiated them from the mass of their fellow-men, and that it would not be well that all the representatives should favor this class. To avoid this, he suggested that the repre-

sentation should be one for twenty thousand instead of one for thirty thousand—a most remarkable proposition, in view of its object. The change would have entitled New York to three additional representatives. Is it possible that the stock of “natural aristocrats” in New York could have been so exhausted by sending six to Congress that she could not furnish three more? Mr. Hamilton, whose voice was not often heard in the General Convention, displayed very signal ability in this, reaffirming the arguments of Chancellor Livingston as to the necessity for a Government acting upon individuals, and declaring over and over again that the principle of the Confederation must be totally eradicated and discarded before an efficient Government could be expected. This was not very seriously dissented from, although it was said that all the ills the country had suffered from could not fairly be laid at the door of the Articles of Confederation. Mr. Williams, of the opposition, said that the Constitution should be so framed as not to swallow up the State Governments: “The General Government ought to be confined to certain National objects; and the States should retain such powers as concern their own internal policy”—a principle so sound that the most ardent Nationalist gladly assented to it. Mr. Hamilton said that the balance between the National and State Governments was of the utmost importance; and the same thing was said by others on both sides. Very little declamation was indulged in, but Mr. G. Livingston created some amusement by representing the Federal District as likely to be surrounded by “a wall of gold—of adamant, which will flow in from all parts of the Continent.” He did not hear the last of his flowing wall for many days. In speaking of the Senate, in advocating a proposition to give the various Legislatures the right to recall Senators, Mr. Lansing said the Senate was intended to represent the sovereignty of the States. “Now, if it was the design of the plan to make the Senate a kind of bulwark to the independence of the States and a check to the encroachments of the General Government, certainly the members of this body ought to be peculiarly under the control, and in strict subordination to the State who delegated them.” Mr. Livingston (R. R.) replied that it was true the Senate was intended to

represent the State Governments; "but they are also the representatives of the United States, and are not to consult the interests of any one State alone, but that of the Union." And Mr. Hamilton said that the design of the Senate was to give stability and energy to the Government. The difference between the propositions of Mr. Lansing and Chancellor Livingston bring out most clearly, it seems to me, the two schools of thought. If Mr. Lansing's premises are correct—if the Senators are merely so many ambassadors, so to speak, then, *of course*, the States should be at liberty to recall them. Not so if Mr. Livingston's view be the true one; and the utter impracticability of such a system as Mr. Lansing desired was so patent that it found few supporters. Mr. Hamilton said that the sacrifice of the States by the Senate, in the General Government, was unimaginable. The States are an essential part of the general system, and as long as Congress realized this they must "even upon principles purely National," have as firm an attachment to the State Governments as to the General Government. In commenting upon the further remark that the aggregate representation in the State Governments and their aggregate energy was greater than that of the National Government, Mr. Lansing said, "Are the States arrayed in all the powers of sovereignty? Can they maintain armies? Have they the unlimited power of taxation? There is no comparison between the powers of the two Governments." There is so much of interest that was said, that it is extremely difficult to avoid very frequent use of paste and scissors. I must not be supposed to have directed attention to every well-put argument on either side, but only to have given samples, as it were, of the general views which prevailed, and which were so well brought out. The "general welfare" clause was animadverted upon by Mr. Williams, and so far as reported in the debates, no one seems to have explained to him or to the Convention that this only empowered Congress to *raise money* for the general welfare—not to pass any and all laws promotive of it. And so he went on most vigorously demolishing a man of straw. When the question of *direct taxation* by Congress was under discussion—a leading point here as elsewhere—Mr. Jay asked, "Would it be right or politic that

the sovereign power of a nation should depend for support on the mere will of the several members of that nation? That the interests of a part should take [the] place of that of the whole, or that the partial views of one of the members should interfere with and defeat the views of all?"

Addressing himself to the danger of the annihilation of the State Governments, which he greatly feared, Mr. Tredwell, in the course of an able speech, declared that the cardinal error, in the arguments of the supporters of the Constitution, was, that whatever powers were not granted by the Constitution were reserved. He maintained that every State Constitution was a recognition of the contrary principle, for all contained express reservations in favor of the people. He continued: "We are told this is a Federal Government. I think, sir, there is as much propriety in the name as in that which its advocates assume, and no more; it is, in my idea, as complete a consolidation as the government of this State, in which legislative powers, to a certain extent, are exercised by the several towns and corporations. The sole difference between a State Government under this Constitution and a corporation under a State Government is, that a State being more extensive than a town, its powers are likewise proportionately extended; but neither of them enjoys the least share of sovereignty; for, let me ask, what is a State Government? What sovereignty, what power is left to it, when the control of every source of revenue, and the total command of the militia are given to the General Government? That power which can command both the property and the persons of the community is the sovereign, and the sole sovereign. The idea of two distinct sovereignties in the same country, separately *possessed* (italics in the original) of sovereign and supreme power, in the same matters at the same time, is as supreme an absurdity as that two distinct separate circles can be bounded by the same circumference." Of course, Mr. Tredwell was wrong in saying that the States were reduced to mere corporations by the Constitution, even admitting that the Constitution conferred all powers on Congress *not prohibited*. It still remained to the States to pass *laws*—not mere municipal regulations—laws for the punishment of crime, for descent and inheritance, etc. But he

was clearly right in the absurdity of "dual sovereignty" in any true sense. And this brings us to note the absence here, as in Virginia and Massachusetts, of any objection to vesting the highly sovereign powers in Congress. I can but repeat, that centralization, and the consequent deprivation of the people of the immediate control of their own affairs, was the great evil against which the opponents of the Constitution were fighting. It is quite noteworthy, too, that, so far as reported, there was no discussion of account upon the words, "We, the people." Numerous amendments, analogous to those brought forward by Virginia and Massachusetts were proposed and suggested to Congress and to the other States in a circular letter. The original form of ratification was "*upon condition*," etc. This was changed to "in full confidence," and a motion by Mr. Lansing to reserve to New York a right to withdraw *from the Union* under certain circumstances was voted down. The Constitution was then ratified by the very narrow majority of three—thirty to twenty-seven.

Lucius S. Landreth.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

BANKS AND BANKING.

Following the rule enunciated in *Bank v. Legrand*, 103 Pa. 309, the Court of Appeals of Kansas has decided that where a bank holds a note signed by a principal and a surety, and the principal has a deposit to his credit at the bank subsequent to the maturity of the note, the bank, while it has the right, is under no duty to retain the deposit for the payment of the note, therefore its failure to do so does not discharge the surety: *Citizens' Bank v. Elliott*, 59 Pac. 1102.

CONSTITUTIONAL LAW.

Judge Lochren of the District Court (D. Minn.) has generally been regarded as a careful and clear-headed judge, and the stump speech which he delivered in *Ex Parte Ortiz*, 100 Fed. 955, on "The Constitution Follows the Flag," came as a shock and a surprise to the profession. The case arose upon an application for a writ of *habeas corpus* brought by an inhabitant of Porto Rico, who had been convicted of murder by a military tribunal of the United States on that island. Judge Lochren wrote a lengthy and, it must be admitted, logical and forcible opinion, to the effect that immediately upon the acquisition of Porto Rico by the United States the federal constitution came into effect there, wherefore conviction could be had only by indictment, grand and petit juries, etc.

Having thus demonstrated to his satisfaction that the constitution followed the flag, the judge turned around and announced that all that he had said before was mere dictum, since in the case at bar the constitution did not apply at all, for the reason the crime and prosecution thereunder had taken place previous to April 11, 1898, upon which date Porto Rico became a part of the United States, by virtue of the ratification of the treaty between Spain and the United States. The proceedings of the military tribunal were there-

CONSTITUTIONAL LAW (Continued).

fore held to be within its jurisdiction, and the petition for the writ was dismissed.

The excuse given by the judge for his constitutional discussion causes a lawyer to smile. He says: "In view of this conclusion, it might seem unnecessary to examine, even as briefly as I have, the claim that the constitution does not apply to newly-acquired domain of the United States, had that claim not been urged with such confidence and amplitude of argument, as the basis on which the decision of the case must rest, that acquiescence might be inferred from silence." Why could he not have said, in a dozen words, that the question, although presented and argued, was not necessary to the decision of the case and would therefore be passed by without comment? The answer might possibly be, in the words of the judge, that the constitutional question has hitherto been discussed only in "an elaborate argument of a law officer of the war department, as well as arguments of several distinguished senators."

In 1899 the Legislature of New York passed a law providing for the imposition of taxes by counties for the purpose of reimbursing all county officers for expenses incurred in criminal prosecutions, previous to the passage of the law, in which they had been acquitted. In *In Re Jensen*, 60 N. Y. Suppl. 933, the law was attacked on the ground that it violated the constitution of New York in imposing taxation for a non-public purpose. The Supreme Court of New York, while admitting that a law might be regarded as public which provided for reimbursement for future prosecutions, held that the alleged moral obligation of the counties to defray the expenses of past prosecutions did not give a public character to the law in question.

The Supreme Court of the United States has dismissed for want of jurisdiction, the bill in equity filed in that court by the State of Louisiana against the State of Texas, its governor and its health officer. The bill sought to obtain relief against the action of the governor and the health officer of Texas in instituting a practical embargo against all goods coming into Texas from New Orleans on the alleged ground of a yellow fever epidemic: *Louisiana v. Texas et al.*, 20 Sup. Ct. 251. The court were of the unanimous opinion that the bill should be dismissed, but the members adopted different grounds of opinion. Fuller, C. J., thought that the embargo by order of the governor of Texas

Taxation for
Public
Purpose, Costs
of Criminal
Prosecutions

Jurisdiction in
Suits Between
States

CONSTITUTIONAL LAW (Continued).

was not such state action as would present a controversy between the two states; Harlan, J., was of the opinion that no harm had been done to the State of Louisiana, but merely to some of the citizens thereof; and Brown, J., while intimating that, if the matter had affected all the citizens of Louisiana, a "controversy" between the states would have arisen, based his concurrence on the ground that the State of Louisiana could not act on behalf of the inhabitants of New Orleans alone.

In order to render its fish and game laws effective, the Legislature of New York seems to have gone a little too far. In 1892 an act was passed (C. 488, § 110) rendering it a misdemeanor for a person to "have in his possession" certain varieties of fish during the closed season. In *People v. Buffalo Fish Co.*, 62 N. Y. Suppl. 543, the defendant, indicted under this law, defended on the ground that the fish in question were imported from Canada, where they had been caught. The Supreme Court of New York held that, as to fish imported from another state or a foreign country, the law was void, as an attempted regulation of commerce on a subject requiring a uniform system of regulation, and therefore exclusively within the control of Congress.

CORPORATIONS.

The laws of Kansas, in regard to the rights of creditors in insolvent corporations, have become famous as sources of litigation throughout the whole United States. The latest instance where they have been called into question occurred in *Woodworth v. Bowles*, 60 Pac. 329, decided by the Supreme Court of Kansas itself. Under the state insolvent corporation law, each creditor of an insolvent corporation was given a direct right of action against the stockholders. In 1897 the Legislature of Kansas passed an act (C. 47, § 55) providing that assignees of insolvent banks should have power to suspend the bringing of such actions by the banks' creditors for the period of one year, during which period the assignees were required to bring suit for the benefit of all creditors. Following *Mech. Bank v. Fidelity Ins. Co.*, 87 Fed. 114, the court held that the separate right of action given to the creditor was a contractual one, therefore, as to creditors whose rights had accrued previous to 1897, the law was void as an impairment of the obligation of contracts.

The late case of the Associated Press has been discussed so widely that it is but necessary to give its citation in the

CORPORATIONS (Continued).

Associated Press, Public Interest advance reports: *Inter-Ocean Pub. Co. v. Associated Press*, 56 N. E. 822. It will be remembered that in this case the Supreme Court of Illinois decided that the Associated Press is a quasi-public corporation; therefore it cannot make and enforce a by-law that its subscribers may not receive news from other sources, under penalty of expulsion.

Suit by Creditor Against Stockholder In *Walter v. Merced Acad. Asso. et al.*, 59 Pac. 136, the defendants, who had been stockholders in a corporation for six years, were sued by a creditor of the corporation for unpaid balances on their stock. The defence set up was that there was a material variance between their agreements of subscription to the stock and the articles as to the purposes of the corporation. The Supreme Court of California properly held that this defence was unavailing as against corporation creditors, but it does not clearly appear whether the court based its decision on the broad ground that the defendants were stockholders, or upon the fact that by their laches in asserting their rights, the defendants were estopped.

CRIMINAL LAW.

Counterfeiting Blank Certificate Rev. Stat. (U. S.) § 5418, makes it a crime to counterfeit any "bid, proposal, guaranty, official bond, public record, affidavit or other writing." In *United States v. Ah Won*, 97 Fed. 494, the defendant was indicted for counterfeiting a blank form of certificate of residence, issued by the government to Chinese persons entitled to remain in the country. Judge Bellinger, of the Circuit Court (D. Or.), decided that as the form was of no value or meaning in its blank condition, the act of the defendant did not come within the purview of the statute.

Corroborative Evidence in Case of Rape In New York there is the generally prevailing statutory rule that no conviction in rape may be had upon the testimony of the prosecutrix "unsupported by other evidence." In *People v. Page*, 56 N. E. 750, the Court of Appeals of New York was called upon to consider what evidence amounted to corroboration under the statute. *Held*, that neither (1) the fact that the prosecutrix made a subsequent complaint of the offence, nor (2) that the defendant remained silent when told that this complaint against him had been made, amounted to such corroboration as would support a conviction.

DAMAGES.

The articles of separation between a husband and wife included a bond given by the husband in the sum of \$2,000, to secure the payment by him to his wife of \$25 per month. It was also provided in the bond that if, at any time, the obligor defaulted in the payment of any of the monthly instalments for more than fifteen days, the principal sum and interest should become due and payable. After the obligor had defaulted for more than six months, an action was brought on the bond for the \$2,000. The obligor tendered the unpaid instalments and claimed that this would relieve him from liability for the \$2,000, but the Supreme Court of Pennsylvania decided that his contention was without merit: *Biery v. Steckel*, 45 Atl. 376.

EVIDENCE.

In New York a strict construction is given to the rule which forbids parol evidence to add to, alter or vary a written instrument. In *Stephens v. Ely*, 56 N. E. 499, the parties entered into a lease under which the lessee was given the right to remove fixtures erected by him, at the expiration of the term. When the lease had expired, a new lease was made containing the usual covenants, but without mention of any right on the part of the lessee to remove the fixtures. The Court of Appeals of New York held that parol evidence was inadmissible to show that it was the intention of the parties to continue the agreement in regard to the fixtures throughout the term of the second lease.

HUSBAND AND WIFE.

The doctrine that the husband and wife constitute one person has been recently asserted by the Supreme Court of Florida. A statute of that state (Rev. Stat., § 967) provides that a judge shall be disqualified from trying a case "by reason of interest, consanguinity or affinity to either of the parties." In *State v. Wall*, 26 So. 1020, the wife of the judge was the aunt of the wife of one of the parties. It was held (1) that the judge was an "affinis" of his wife's niece, and (2) therefore was connected by affinity with the niece's husband, since the husband and wife were but one person in the eye of the law.

Whether or not a wife may successfully bring an action for the alienation of her husband's affections is a question upon

HUSBAND AND WIFE (Continued).

Alienation of Husband's Affections which the courts have disagreed. In *Crocker v. Crocker*, 98 Fed. 702, the Circuit Court (D. Mass.) was called upon to decide it under the law of Massachusetts. Putnam, Jr., held that under the English common law, which existed in Massachusetts unaffected by statute, the mere alienation of the husband's affections did not give a right of action to the wife, but that the loss of the husband's *consortium* would be an element of damage if it was the probable consequence of any tort for which the wife could bring suit.

The Supreme Court of Pennsylvania declared to be a necessity a course of practice which Pennsylvania lawyers have hitherto adopted from abundance of caution. **Separate Acknowledgment by Wife** In *Bingler v. Bowman*, 45 Atl. 80, the question was presented whether or not the Married Women's Acts of 1848, 1887 and 1893 had relieved a married woman from the necessity of acknowledging a deed of her real estate separate and apart from her husband, according to the act of 1770. It was held that the Married Women's Acts affected merely the power of married women, and not the formality necessary for its exercise; therefore the act of 1770 was still in force.

The conservative position retained by some states to the present day on the subject of the power of married women is remarkable. At the present time in Virginia a **Married Women's Contracts** married woman is not liable on her contracts, unless the same are made in respect to her separate estate: *Hirth v. Hirth*, 34 S. E. (Va.) 964.

INSURANCE.

In *Johnson v. Ins. Co.*, 56 N. E. 569, the insurance policy provided that it should become void "if the premises hereby **Vacation of Premises, Abandonment** insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days." There being evidence to show that the vacancy was merely temporary in character, the Supreme Court of Massachusetts decided that the jury were properly instructed that provision in the policy would not apply unless they should find that the vacancy was intended to be permanent.

NEGLIGENCE.

One of the first fruits of *R. R. v. Conroy*, 20 Sup. Ct. 85, in which, it will be remembered, the Supreme Court of the

NEGLIGENCE (Continued).

Fellow Servants United States overruled the leading case of *Ross v. R. R.*, 112 U. S. 377, is *Briegal v. South. Pac. Rwy.*, 98 Fed. 959, where the Circuit Court of Appeals (Ninth Circuit) held that an engineer and his fireman were fellow servants, so as to preclude a recovery by the fireman for the negligence of the engineer.

Schafer v. Central Rwy. Co., 61 N. Y. Suppl. (Sup. Ct.) 806, is authority for the propositions (1) that it is not necessary for a passenger on a street car to give notice to the conductor of his intention to alight, if he arises to alight at the same time another passenger does, who has given notice, and (2) that it is not negligence *per se* for the passenger to fail to take hold of the railings, when alighting, to guard against a sudden starting of the car.

PARTNERSHIP.

Johnson v. Haws, 62 N. Y. Suppl. 641, raises the question whether or not notice to a partnership creditor that one of the partners is not to be bound relieves such partner from liability. In that case the two partners entered upon a building operation with a provision in the agreement that one of them was not to be liable for the debts. The plaintiff, having notice of this provision, supplied material for the operation and sued the partner who was not to be held liable. The Supreme Court of New York decided that the plaintiff was bound by his knowledge of the agreement, but Ingraham, J., dissented, on the ground that it was against public policy to allow a partner to stipulate for the profits of an undertaking without liability to the creditors, and that the agreement for non-liability was binding only between the partners.

PRINCIPAL AND AGENT.

In *Janes v. Citizens' Bank*, 60 Pac. 290, an action was brought against Fred. R. Janes on a promissory note which was in the usual form: "We promise to pay, etc." The note was signed: "Jacob Guthrie, president of Enid Town Co.; Fred. R. Janes, secretary the Enid Town Co." The Supreme Court of Oklahoma, (overruling the former case of *Keokuk Co. v. Kingsland Co.*, 5 Okl. 32,) decided that the note disclosed a latent ambiguity as to whether or not the defendant signed merely in his official capacity; therefore parol evidence was admissible on the part of Janes, to show that he signed as

Parol Evidence to Show Contract as Agent

PRINCIPAL AND AGENT (Continued).

agent and that he was not to be held liable on the note. The opinion of Hainer, J., contains a detailed review of all the authorities on the subject.

QUASI-CONTRACTS.

The Supreme Court of Pennsylvania, while holding that tolls which have been illegally exacted by navigation companies may be recovered back, requires as a prerequisite to the action that they shall have been paid under protest. Therefore in *Mon. Nav. Co. v. Wood*, 45 Atl. 73, it was held that in the absence of a protest at the time of payment, or notice of an intention to demand back the tolls, they could not be recovered.

Recovery
of Illegal
Tolls,
Protest

REAL PROPERTY.

The strong tendency of courts to construe all conveyances to husband and wife as conveyances in entireties is illustrated in *Simons v. Bollinger*, 56 N. E. 23. In that case the conveyance was to "A., and B., his wife, jointly." The Supreme Court of Indiana decided that since all conveyances to husband and wife raise a strong presumption of an estate in entireties, nothing less than the express words, "in joint tenancy," is sufficient to create a joint estate. The word "jointly" was therefore treated as surplusage.

Conveyance to
Husband
and Wife

There is some question whether or not a covenant in a deed requiring the erection of dwelling houses is broken by the erection of an apartment house for dwelling purposes only. It was not necessary to pass directly upon this question in *Hurley v. Brown*, 60 N. Y. Suppl. 846; the Supreme Court of New York deciding that a covenant, "to build a substantial dwelling house to cost not less than \$2,500," was not exclusive, so that it would prevent the erection of buildings other than dwelling houses, therefore the erection of an apartment house was no breach.

Restrictive
Covenants,
Apartment
House

The question whether or not an easement exists in favor of land for the flow of its surface water over a lower adjoining property has been variously decided. There are many authorities both ways, and some courts hold that the easement exists in the country, but that in cities every owner of property has the right to improve

Easement for
Flow of
Surface Water

REAL PROPERTY (Continued).

it without regard to the flow of surface waters from other properties. In *Carland v. Aurin*, 53 S. W. 940, the question first arose before the Supreme Court of Tennessee in regard to city lots. It was held, in opposition to the weight of authority, that no distinction was to be made between city and country properties, but that the easement in favor of the upper property existed in both cases. The law on this subject has been collected in 38 *AMERICAN LAW REGISTER* (N. S.) 707.

SHERIFFS.

Contrary to the rule in some states, it is held in West Virginia that as between the parties to a suit and their privies
 Return, the return of the sheriff is conclusive and the party
 Impeachment injured by a false return has recourse against the sheriff only. Therefore the defendant to an action cannot deny the service of process upon him, when a return to that effect is made, nor can he maintain a bill in equity to enjoin the prosecution of the action under these circumstances: *McClung v. McWhorter*, 34 S. E. 740.

In *Wells v. Johnston*, 27 So. 184, an action was brought against the sheriff for an illegal arrest. It appeared that the
 Liability for plaintiff, who had been arrested, was not the person
 Arrest of named in the warrant, but that the sheriff had
 Wrong Person reasonable cause to suppose that he was the person and had acted without malice. The Supreme Court of Louisiana at first affirmed a judgment for the defendant, but upon rehearing decided that the liability of the sheriff was absolute for a false arrest, and the absence of malice was to be considered merely in mitigation of damages. Watkins, J., delivered a strong dissenting opinion.

STATUTE OF FRAUDS.

In Maryland, by virtue of a provision of the state constitution, the English statute of Frauds (29 Car. II.) is in force.
 Contract of The question lately arose whether a parol promise
 Marriage to marry came within the statute, as being a contract "not to be performed within one year." The Court of Appeals of Maryland, in a learned and exhaustive opinion by McSherry, C. J., after noting the fact that there is no English authority on the subject, gives its approval to those of the American cases which hold that this form of contract is without the purview of the statute and is therefore enforceable: *Lewis v. Tapman*, 45 Atl. 459.

SURETYSHIP.

Hyde v. Miller, 60 N. Y. Suppl. 975, raises a very interesting question regarding the duty of a surety, before paying the debt, to ascertain whether or not his principal has been released. In this case A., who had made a mortgage to B., conveyed the property to C., who covenanted to assume payment of the mortgage debt. A. thus became surety for the mortgage debt, with C. as principal. B. brought an action against A. and C. jointly, pending which B. and C. came to an arrangement whereby B. released C., and this release was entered upon the judgment roll of the action. B., however, pursued the action to a judgment against A., who paid it (in ignorance of the fact that he had been discharged from liability by B.'s release of C.), and A. then brought an action against C. for reimbursement. The Supreme Court of New York allowed a recovery, holding (1) that the release of C. without notice to A. was a fraud on A., (2) that the entry on the judgment roll was not notice to A., and (3) that there was no duty cast upon A., before paying B., to ascertain whether or not C. had been released. All these propositions were denied in the dissenting opinion of Spring, J.

Release of
Debtor, Duty
of Surety to
Ascertain
before
Payment

TRIAL.

It is generally held that in suits for personal injuries the trial court possesses the discretion to order, or refuse to order, the physical examination of the person injured by one of the defendant's physicians. But if such an order is made, and the subject of the order refuses to submit to the examination, will such refusal be allowed to prejudice any one but the person so refusing? This was the question in *Bagwell v. Atlanta St. Rwy. Co.*, 34 S. E. 1018, where the plaintiff brought an action for personal injuries to his daughter, who was nearly twenty-one years of age. The Supreme Court of Georgia held that the refusal of the daughter to obey an order of court decreeing the examination did not affect the right of the father to recover, since he had not control over his daughter's movements, and could not compel her to undergo the examination.

Physical
Examination
of Plaintiff

Reiss v. Town of Pelham, 62 N. Y. Suppl. 607, an action for negligence against a town, showed most remarkable conduct on the part of the jury. On a motion for a new trial, after verdict for the defendant, the attorney for the plaintiff produced affidavits, signed by all the jury, that, in their opinion, "both the

Misconduct
of Jury,
Affidavits,
New Trial

TRIAL, (Continued).

village and the town should have been sued, and that the entire damage should not be borne by the said town," and "that the said jury believed that under the law the plaintiffs could maintain an action against both municipalities hereafter, or they would not have brought in a verdict for the defendant." Gaynor, J., of the Supreme Court of New York, while severely scoring the action of the jury as "scandalous" and "outrageous," decided that the mere fact that the jury decided the case according to their view of the law, instead of upon the facts of the case, did not afford a ground for setting aside the verdict.

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The article entitled "Has the Study of Law a Place in a Liberal Education," which appeared in our June number, was written by Dr. W. Draper Lewis, Dean of the University of Pennsylvania Law School. Through an oversight the name of the author was omitted.

██████████
IN MEMORIAM.

WILSON STILZ.

Wilson Stilz, a member of the Board of Editors of the AMERICAN LAW REGISTER, died on June 13, 1900. Mr. Stilz was a member of the second year class in the Department of Law of the Univer-

sity of Pennsylvania. He prepared for college at Eastburn Academy, Philadelphia, and graduated from that institution with the highest grade ever attained in its history.

Mr. Stilz graduated from the College of the University in 1898, receiving the degree of Bachelor of Science in *Economica*. His work at College showed his great ability as a student—for each of his four years of study he was awarded “Honors” by the Faculty, in Junior year taking the Terry prize for standing first in his class, and his graduating thesis on “Railroad Co-operation” was published by the University.

Mr. Stilz, in his first year at the Law School, divided with another member of his class the prize for standing at the head of the class. In his second year Mr. Stilz was taken ill just previous to the examinations.

CONTRACT—RES ADJUDICATA—JUDGMENT A BAR TO SECOND SUIT UPON SAME CAUSE OF ACTION—WAGES. In *Alie v. Nadeau*, 44 Atl. 891, (1899), defendant had agreed to hire plaintiff for six months from November 9, 1897, at \$10 per week, payable weekly; but on January 15, 1898, plaintiff was discharged by defendant, without lawful cause; his wages, however, having been paid in full up to that date, March 12, 1898, plaintiff brought suit against the defendant to recover damages for his breach of contract, and claiming damages to the date of his writ, March 12, and ultimately recovered damages for an amount equal to the weekly wages agreed upon from January 15 to March 12, 1898. The present action was commenced November 23, 1898, upon the same breach of the same contract, and with intent to recover from defendant damages, from March 12, 1898 to May 9, 1898, the remainder of the period covered by his contract with plaintiff.

The question for decision was whether or not the former judgment was a bar to recovery. *Savage, J.*, decided that it was, and that for a single breach of contract there can be but a single recovery. The plaintiff was, in his former action, “entitled to recover all the damages he sustained by the breach, both present and prospective, and for such a breach but one action can be maintained. *Sutherland v. Wyer*, 67 Me. 64, 1877. It is to be PRESUMED that in his former judgment he recovered all he was entitled to receive for the breach.”

The case is a clear illustration of Sedgwick’s “Elements of Damages,” Rule 21: “For a single cause of action all damages incident to it must be assessed in a single suit,” but it raises some interesting questions. Plaintiff argued that the contract was devisible, or continuing, and that therefore he could apportion his damages; but the court followed *Sutherland v. Wyer* (*supra*), where it was decided in accordance with the great weight of authority that such a contract of employment was an entire contract, and that therefore damages must be assessed for a breach of it in a single action. *Parker v.*

Russell, 133 Mass. 74, (1882). *Wichita & W. R. R. Co. v. Beebe*, 39 Kas. 465, (1888). In case of a final and conclusive breach of such a contract, as by a discharge, the party discharged is exonerated from any further performance of the contract, and may sue at once for such damages as he has sustained by the breach. He need not wait until the expiration of the period covered by the contract, nor is it necessary for him to tender his services or hold himself in readiness to perform for any length of time at all, but he may sue at once. *Howard v. Daly*, 61 N. Y. 362, (1875); *Dugan v. Anderson*, 36 Md. 567, (1872). In *Sutherland v. Wyer* (supra), plaintiff was discharged January 8, and brought suit January 11, when nothing whatever was due him according to the terms of his contract, and he was allowed entire damages.

In such cases the damages which plaintiff is entitled to recover include not only damages actually sustained when the action was commenced, or at the time of the trial, but also whatever the evidence proves he will be likely to suffer thereafter from the same cause. *Remelee v. Hall*, 31 Vt. 582, (1859). This represents the great weight of authority, but for a Wisconsin case contra, see *Gordon v. Brewster*, 7 Wis. 355, (1857).

The amount of such damages is not speculative, but is to be determined by the jury, in accordance with the following rules: *Pima facie*, the amount of damages is the amount of the stipulated wages for the remainder of the period; if the time of the trial is after the expiration of the period covered by the contract, the jury must deduct from the above amount what the plaintiff has earned during that period since his discharge, or what they think he might with proper diligence have earned; or, if the suit is brought and trial held before the expiration of the period covered by the contract, the jury must deduct such earnings of the plaintiff, and also what they think he may with proper diligence earn before the expiration of such period. The sum which remains, with interest, will be the proper measure of damages. The injured party must do all he reasonably can and improve all reasonable and proper opportunities to lessen the injury. *Miller v. Mariners' Church*, 7 Me. 51, 56, (1830), 2 Greenl. Ev., § 261; *Chamberlin v. Morgan*, 68 Pa. 168, (1871), Sedg. on Dam. (sixth edition) 416, 417.

The burden of proof is on defendant to show, in mitigation of damages, that plaintiff found employment elsewhere, or that other similar employment was offered and declined, or at least that it might have been found, with reasonable diligence, or that plaintiff may yet find employment elsewhere, as the case may be.

In any case where plaintiff has already brought suit and recovered judgment for such breach of contract, such judgment is presumed to include all that he is entitled to receive for that breach. So long as the judgment stands, the plaintiff cannot bring another action for the same cause. *Nashville, etc., Railway Co. v. United States*, 113 U. S. 261, (1884); *Gould v. Sternberg*, 128 Ill. 510, (1889). And this is the law whenever judgment is given in an action, whether by consent or by decision of the court. *Ex parte Bank of England*, (1895) 1 Ch. 37. The mere bringing of an action, however, does

not discharge the right to bring the action. Pendency of action in one state does not bar an action in another state, or in the Federal Courts. *Pierce v. Feagans*, 39 Fed. Rep. 587 (1889); *Stanton v. Embrey*, 93 U. S. 548, (1876); *McJilton v. Love*, 13 Ill. 486, (1851). But a plea of the pendency of an action is a good plea in abatement to another action upon the same breach of the same contract in courts of the same jurisdiction. *Bendernagle v. Cocks*, 19 Wend. 207, (1838).

In *Alie v. Nadeau*, the court says where the defendant has contracted to pay plaintiff his wages weekly, and makes default in such payment, plaintiff can maintain "an action for services performed on each failure of the defendant to pay as he agreed." That is to say, if defendant owes plaintiff a week's wages on March 6, and fails to pay the same, plaintiff can bring suit for the amount on March 7, and need not wait until the expiration of the period covered by the contract of employment in this case, any more than in the former. And if a second week's wages falls due on March 13, and is unpaid, a second suit may likewise be brought on March 14, and so *ad libitum*. This part, therefore, of the contract of employment, namely, the agreement to pay, is divisible, while the former, the agreement to employ, is indivisible or entire. Whether a contract is divisible or entire, or, in other words, whether a breach of it may give rise to several suits or to but one, depends upon the question whether by such breach the contract is at once brought to an end, or in spite of the breach continues in effect. When an employer discharges his servant contrary to contract, the contract is thereby at once repudiated and at an end, and the breach is final and conclusive, and there can be but one action therefor. But where the breach is the mere failure to pay stipulated wages, each such breach is separate and single, and by itself a cause of action. It is a breach merely of a part of the contract, while the contract itself as a whole continues. For a week's wages, too, if unpaid according to the terms of the contract, the employee is entitled to waive the contract and sue *in indebitatus assumpsit*, for a *quantum meruit*, or the value of so much as he had done. So the services rendered each week, of themselves, constitute a separate cause of action, while the employer's breach of the contract by discharge, as above, is at once a single breach of an entire contract; suit can be brought only on the special or express contract, and plaintiff is entitled to but one such suit.

If at any time, however, in suing for failure to pay weekly wages, the plaintiff sues for a part only of the sums due, a judgment will be held to be satisfaction of all the sums which could have been included in that action, and were due and payable by the terms of that contract; and therefore no further suit can be maintained on any of them. The reason for this rule is the prevention of unnecessary and oppressive litigation; *Parsons on Contracts*, III, *188.

In all cases the question is, what is the cause of action? All damages arising from a single cause of action must be assessed in a single suit.

WORDS EXPRESSING TESTAMENTARY INTENTION.—*Webster v. Lowe*, 53 S. W. Rep. 1030, (Kentucky, November 23, 1899). This was a contest of the alleged will of James Lowe, deceased. The paper, a part of which was offered for probate in the Kentucky courts, was in the handwriting of the decedent and was found among his effects after death.

In its entirety, the document is a brief life-history of the writer, reciting as it does the date of his birth; how he came from England to New York in 1839; his going to Piqua to reside, teaching school part of the time, etc., etc. The items offered for probate occur just subsequent to a statement of the purchase of "the property on Third and Main streets," and its rental by deceased to his son-in-law, "Charlie" Webster, and read as follows: "He has done much improvements about it, and *I have requested my executors to give a clear deed for the property, after my death, to Maggie, his wife, and Charlie.*" In addition to the document itself, parol evidence was introduced showing that the deceased had made at least two wills prior to this paper, and had in each devised the property described to Webster and wife.

The Court of Appeals agreed with the lower court in holding that the two former wills last seen in custody of the testator, and not found after due search, are presumed to have been destroyed by the testator *animo revocandi*, [citing *Mercer v. Mercer's Adm.*, 87 Ky. 21, (1888)]. This is so unquestionably true, and such familiar law, as to require no comment. Jarman on Wills, Vol. I, page 290, and the many cases there cited in the notes; Am. and Eng. Encyclop. of Law, Vol. 13, page 1094, note.

The sole question before the court, therefore, was as to whether the paper above referred to is itself a will. This question, the Appellate Court, reversing the lower tribunal, answered in the affirmative.

The court support their decision for the will on the broad and indisputable proposition that "The law does not require it should assume any particular form, or that any technically appropriate language should be used therein, if the intention of the maker is disclosed and the destination of his property at his death is described"; and in application of this principle we find, a little further along in the opinion, the assertion that "the language used by the testator shows that it was his purpose that the title to the property should vest in Webster and wife, after his death." Therefore, says the court, this paper, satisfying as it does the Kentucky statutes on execution, is a will.

This conclusion will scarcely bear a close scrutiny. Granting to the uttermost the interpretation of the court upon the question of fact presented,—the question, namely, as to the meaning of the words probated,—that interpretation will be seen to support nothing more than the proposition that at the time of the writing the deceased was of a mind to leave his property to "Charlie." We will not stop to quibble as to whether or not the words "*I have requested my executors,*" etc., are indicative of a *present* frame of mind; but conceding that the deceased would have answered any

questioner as to his intent by a flat-footed statement that he meant "Charlie" to have all, we yet fail to see how that fact makes the document a will. A present testamentary intent is not a will, nor does it become such by reason of the fact that its existence is to be gathered from a paper duly signed, etc., so as to satisfy the "will's act" of the jurisdiction. The paper is a will *only* if it was intended to operate as such. It is by following cases that may, at first glance, seem contra to this broad truth, that the Kentucky court seems to have gone astray.

It is true, as the opinion points out, that a promissory note, payable after the maker's death and delivered by him to his nephew without other consideration, has been sustained as a testamentary provision. *Jackson v. Jackson's Adm.*, 6 Dana 257, (1838); that an instrument disclosing the intention of the maker respecting the posthumous destination of his property and not to operate until after his death is a will, though it be "in the form of a deed, signed, sealed and delivered as such." *Johnson v. Yancey*, 20 Ga. 707, (1856); that an endorsement by a payee,—“If I am not living at the time this note is paid, I order the contents to be paid to A,” and signed, is a will. *Hunt v. Hunt*, 4 N. H. 434, (1828); etc., etc. It is not intended for a moment to discredit these opinions, but simply to deny their availability as standing contra to the rule that a document is a will only when the testator so intended it. A testator may think he is making a promissory note, or a deed, or what not, and the instrument yet be a will, the requirement that he so intend it being satisfied by his intent to dispose of property *by that very instrument* and in such a manner that the court will say, "This is a testamentary disposition." In the words of the Am. and Eng. Enc. of Law, Vol. 29, page 138, referring to such cases: "The requirement that the instrument be written *animo testandi* does not mean that the testator meant to write his will when he sat down to write it, but that he intended the instrument to be operative . . . and to effect by it such a disposition of his property as would be in its legal effect testamentary." See also Schouler on Wills (second edition), § 272, and Redf. on Wills (fourth edition), 171.

We think it plain, that in the case under discussion there is no expressed or fairly implied intent to effect by the instrument in question any disposition of property. "I have requested my executors to give a clear deed," etc. These are the words. That they merely recite a past act is obvious, doubly so when we recall that the paper in its entirety is but a narrative review of the decedent's life and doings. Why then consider the clause in question less a mere recital of past happenings than are the other parts of the document? Can we ignore the logical connection of the sentence probated, to say nothing of going flatly contra to its grammatical construction, and call it a present disposition of property? Suppose the words had been, "I shall tell my executors to deed the property to Charlie," and that this clause had been among many connected statements of what the writer purposed doing in the future. Would this be a will?

Think for a moment of the consequence involved of necessity in the Kentucky decision. A makes a will giving his house to B. The

next day A writes in his diary, "I have left my house to B." A week or a month, or it may be ten years later, A dies and the original will is not found. The presumption, admitted by the Kentucky tribunal, is that this will has been destroyed, and yet, in the face of this admitted intent to revoke, we are asked to hold the diary entry of itself a will. In other words, we have the curious result, that in order to revoke a will by destruction, the testator must cancel not alone the original testamentary document but also every subsequent recital, in letter, journal, or memorandum, referring to the past disposition made. This result we cannot accept as a sound exposition of a system of law that has been nothing if not practical and common sense in its principles.

Because, therefore, of the grammatical structure of the sentence probated, wholly in the past tense as it is; and because of the connection in which the words are found, as part of a narrative life history; it does not seem reasonable to hold for a moment that the writer meant by the very document in question to make a disposition of his property. This conclusion is but strengthened by the quondam existence of the wills to which the later narrative might well have referred. Then, finally, the *reductio ad absurdum* to which the Kentucky decision would lead us in the matter of revocation adds the weight of expediency to that of principle in forcing the conclusion that the justice of an individual case has led the court in *Webster v. Lowe* to find a testamentary intent where no testamentary words warrant the finding.

MUNICIPAL BONDS; DEFENCES; JUDGMENT AS ESTOPPEL; RECITALS.—*Geer v. Board of Ouray County*, 97 Fed. 435, (1899). This was an action brought in the Circuit Court for the District of Colorado, by the holder of bonds of Ouray County, to enforce the collection of overdue coupons. He alleged that the county was indebted to various persons who had recovered judgments against it to the amount of \$200,000; that bonds were issued in payment of the judgments in accordance with a statute, and came into the hands of the plaintiff for value; that the bonds contained the following recital: "This bond is issued by the board of county commissioners of Ouray County, under and by virtue of an act of the General Assembly of the State of Colorado, entitled 'An Act to enable the several counties of the State to refund their bonded debt which has matured or may hereafter mature, and to issue bonds in satisfaction of judgments and matured bonds'." To this action the county pleaded eight separate defences. A demurrer to all was sustained. The sixth and seventh defences were amended. A demurrer to the sixth was overruled, and a demurrer to a replication to the seventh was sustained. Both parties appealed.

Only two questions, those raised by defences six and seven, are of any great importance. On the former it was stated that the debts of the county, upon which the judgments were rendered, were invalid because in excess of the constitutional power of the county

to incur debts, and that the validity of the claims was not adjudicated in the actions in which the judgments were given.

In answer to this the court said the debts must necessarily have been determined to be valid when judgments against the county were given. Geer, the plaintiff, holding bonds issued in payment of the judgments stood in privity with the plaintiff in the judgment suits, and could rely upon every presumptive and estoppel to which they were entitled. "In an action between the same parties, or those in privity with them, upon the same claim or demand, a judgment upon the merits is conclusive, not only of every matter offered, but of every admissible matter which might have been offered to sustain the claim or demand." The court referred to language used in a previous case. "In an action to enforce the collection of a judgment or the collection of bonds or coupons issued in payment of a judgment against a municipal or quasi-municipal corporation, the judgment conclusively estops the corporation from making the defence that the original indebtedness evidenced by it was in excess of the amount which the corporation had the power to create under the limitations of the constitution of the state in which it was incorporated." See *Board v. Platt*, 79 Fed. 567, (1897), and cases there cited.

The question presented by the seventh defence gave rise to a dissenting opinion by Judge Caldwell. The defence was that there never were any judgments against the county in payment of which the bonds were issued. The court admitted this to be a good defence against an original creditor who had accepted the bonds without obtaining any judgment. But it was not good against a bona fide holder of the bonds who bought in reliance upon the recital. Such recital operated as a complete estoppel. "The existence of the judgments was a condition precedent to the exercise of the power to issue bonds,—a condition whose existence it was the duty of the board to ascertain before it issued them." The recitals "preclude inquiry, as against innocent purchasers for value, as to whether or not the precedent conditions had been performed when the bonds were issued." A long line of cases are then cited which, in the main, support the majority view.

Judge Caldwell referred for the reasons of his dissent to the case of *West Plains v. Sage*, 69 Fed. 943, (1895). Then a township issued bonds purporting to be in pursuance of a statute giving it power to issue bonds to refund old indebtedness. The bonds recited the statute and the purpose of the bonds to refund debts, and that all the requirements of the statute had been complied with. In reality they were issued to build a sugar factory. In a suit by a bona fide holder the township was estopped to deny the validity of the bonds. Caldwell rested his opinion on the ground that the bonds were non-negotiable. He argued that municipal corporations were merely state agencies for local purposes, and that they had no power beyond that expressly or impliedly granted them. The power to borrow money did not include the power to issue negotiable bonds. The power to issue bonds as stated in this act did not give power to issue negotiable bonds, therefore the plaintiff was not a holder for

value. In support of his view he cited *Merrill v. Monticello*, 138 U. S. 673; *Hill v. Memphis*, 134 U. S. 198; *Brenham v. Bank*, 144 U. S. 173. But in these cases there is given no power to issue bonds, but merely the power to borrow money. They hold that the power to issue negotiable bonds is not to be inferred from the limited borrowing power.

The majority view in these two cases is supported by reason and authority. The power to issue bonds means negotiable bonds, because in its ordinary signification a bond is a negotiable instrument; many legitimate public purposes could not be effected except by issuing such certificates of indebtedness. Furthermore, by declaring a municipal corporation estopped from setting up as a defence that bonds were issued for an illegal purpose, such purpose is effectually checked. See *National Life Ins. Co. v. Board*, 62 Fed. 778; *Jasper Co. v. Ballou*, 103 U. S. 745; *Board v. Howard*, 83 Fed. 296.

In *Rollins v. Board*, 80 Fed. 692, (1897), the rights of a purchaser of bonds were considered. His position is the same as that of the ordinary purchaser of commercial paper. "A bona fide holder of commercial paper is entitled to transfer to a third party all the rights with which he is vested, and the title so acquired by his indorsee cannot be affected by proof that the indorsee was acquainted with the defences existing against the paper."

BOOK REVIEWS.

PENNSYLVANIA LAW OF GUARDIANS. WILLIAM TRICKETT, LL. D. Philadelphia: Published by T. and J. W. Johnson & Co. 1900.

A sound treatise of the law of guardians, adapted for practice in Pennsylvania, has just been written by William Trickett, Dean of the Dickinson School of Law. The book is thoroughly practical. It is intended for the use of guardians as well as lawyers. A great portion of its matter consists of a statement of the procedure in the Orphans' Court to carry out the duties and enforce the liabilities of guardians. It is based on statutes and cases. Frequently their facts are stated in the text or in the notes. The statutes are treated with great clearness. Each section bearing on a point is given *verbatim*. Its analogy, if any, with English statutory law is briefly noted. In several instances are given the facts which must exist in order to render a statute operative. It is then viewed in the light of adjudications. Common law rules, unchanged by statute, are pointed out. The right of an infant of fourteen years or over to choose a guardian, subject only to the power of the Orphans' Court to prevent an improper selection, is shown by passages from Blackstone and Kent to be analogous to the right possessed by wards in England in the last century to oust guardians for nurture or in the socage, and choose others of their own selection.

The work, as a whole, is admirably planned. The subject proper is treated in thirty-six chapters. Each chapter is divided into sections, the gist of which is suggested by a sentence in heavy type at the head. Such an arrangement greatly facilitates reference work. The chapter entitled "Removal of Guardians" well illustrates the author's method. First is given the statutory provision for removal. Then follow decisions as to classes of guardians removable, and the causes covered by the statute. Second, the procedure to obtain dismissal, the qualifications of the petitioners, the effect of removal, the enforcement of the order, and right of appeal.

Chapters of interest are those which relate to the apprenticing of the child under the old acts of 1713 and 1770 and as modified by later legislation, which prescribe the duties of the guardian as to special assets; and which provide for the sale of real estate under the Price Act, April 18, 1853. The last subject is treated in an especially thorough and instructive way.

The practical value of the book is much increased by a special chapter on Forms, compiled by Professor Sylvester B. Sadler.

The index is complete. A feature is a chronological list of Acts of Assembly bearing on this subject, dating from 1713 to 1899.

THE LAW OF WILLS. By H. C. UNDERHILL, of the New York Bar. Chicago: T. H. Flood & Co., 1900.

To the older members of the bar, Jarman will always be the leading authority on the subject of Wills. This subject, however, is of such complexity, owing to the eagerness with which the courts welcomed and embraced any opportunity for a departure from the strict rules and technicalities of the statutes, both of Frauds and of Wills, that to the younger members of the profession all authorities are most welcome. Indeed, any work, provided it present a new view, or view under another phase, the ever-recurring problems of testators' intentions and testamentary gifts and devises, is carefully scanned. The work before us is an authority in the most comprehensive sense of the term; it contains all the latest cases on the subject and gives due prominence to the American cases, while neither omitting nor intentionally passing over the older English authorities. Two large volumes well arranged and carefully indexed, contain not only the law of Wills but also the law on cognate subjects, such as *gifts mortis causa* and those doctrines of Equity and the rules of the law of Real Property most frequently applicable to testamentary dispositions of property.

To be more precise, as the author himself states in the preface, the first volume is devoted to the various subjects which deal more particularly with the law of Wills, so that the composite whole makes up a very good treatise on the subject, while in the second volume we find Equitable Satisfaction and Election. The first volume is therefore of more particular value to the student; the second constitutes a book of ready reference for the practitioner.

We note with satisfaction, in these days of broken wills, the length of the chapter on Testamentary Capacity, while Fraud and Undue Influence justly merits a chapter to itself. Incorporation by Reference as well as Revocation deserve more attention at the author's hands. A table of contents is annexed to Volume I as well as to Volume II, a great help this to a busy lawyer. The index and table of cases is most complete. Mr. Underhill, in this as well as in his works on that other subject of great complexity, Evidence, has made the profession his debtor.

J. M. D.

BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked * will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, S. W. Cor. Thirty-fourth and Chestnut Streets, Philadelphia, Pa.]

COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. Vol. VII.
By SEYMOUR THOMPSON, LL.D. San Francisco: Bancroft-Whitney
Co. 1899.

GREENLEAF'S TREATISE ON THE LAW OF EVIDENCE. Vol. I. Edited
by JOHN HENRY WIGMORE. Boston: Little, Brown & Co. 1899.

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PERRY. Fifth Edition. Edited by JOHN M. GOULD. Two Volumes.
Boston: Little, Brown & Co. 1899.

FORMS OF PLEADING. By AUSTIN ABBOTT. Volume II. Compiled by
CARLOS C. ALDEN. New York: Baker, Voorhis & Co. 1899.

THE LAW OF PRESUMPTIVE EVIDENCE. By JOHN D. LAWSON. Second
Edition. St. Louis: Central Law Journal Co. 1899.

CASES ON CODE PLEADING. By CHARLES M. HEPBURN. Cincinnati:
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CHRISTIAN SCIENCE: A PLEA FOR CHILDREN AND OTHER HELPLESS
SICK. By WILLIAM A. PURRINGTON. New York: E. B. Treat &
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RAILWAY CO-OPERATION. By CHARLES S. LANGSTROTH and WILSON
STILZ. Boston: Ginn & Co. 1899.

A TREATISE ON THE LAW OF WILLS. Two Volumes. By H. C. UN-
DERHILL. Chicago: T. H. Flood & Co. 1900.

A SELECTION OF CASES ON CONSTITUTIONAL LAW. By EMLIN MC-
LAIN. Boston: Little, Brown & Co. 1900.

JURISDICTION OF THE FEDERAL COURTS. By HON. AMOS M. THAYER.
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A SYNOPSIS OF THE LAW OF CONTRACT. By HON. AMOS M. THAYER.
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IN MEMORIAM—F. CARROLL BREWSTER. Compiled by the Associated Students of F. Carroll Brewster. Philadelphia: Allen, Lane & Scott. 1900.

MY MYSTERIOUS CLIENTS. By HARVEY SCRIBNER. Cincinnati: The Robert Clarke Co. 1900.

THE LAW OF BANKS AND BANKING. By JOHN M. ZANE. Chicago T. H. Flood & Co. 1900.

THE LAW OF GUARDIANS IN PENNSYLVANIA. By WILLIAM TRICKETT. Philadelphia: T. and J. W. Johnson & Co. 1900.

***CONSTITUTION AND ADMISSION OF IOWA INTO THE UNION.** By JAMES ALTON JAMES. Baltimore: The Johns Hopkins Press. 1900.

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No. 8.

THE OBLIGATION OF THE LEGISLATURE AS WELL AS OF THE JUDICIARY TO RESPECT CONSTITUTIONAL LIMITATIONS.

[Paper read by RICHARD C. DALE, ESQ., before the Pennsylvania State Bar Association at its Annual Meeting, June 27, 1900.]

In September, 1887, the Centennial of the Federal Constitution was celebrated in Philadelphia. In February, 1890, the Centennial of the Supreme Court of the United States was celebrated in the city of New York. On each occasion the Federal and State Judiciary joined with statesmen and distinguished leaders of the bar in giving testimony to the successful working of a Constitutional System, by which firm barriers have been raised against the tyranny of political assemblies. Its checks and delays aptly have been said by James Russell Lowell to be "but obstacles in the way of the people's whim and not of their will."

But our ears are dull of hearing if we have failed to catch an undertone of murmuring and questioning. Particularly during the last decade alarm has been justly excited in the hearts of those, to whom the Constitution is the great palladium of our liberties.

The spirit of criticism has attacked not only the Federal Constitution, but also the System as embodied in the State Constitutions. Doubts have been raised as to the wisdom of any written Constitution. The exercise by the judiciary of the power of declaring statutes void, because in derogation of constitutional provisions has been most vigorously assailed as an unwarranted interference with the right of the people to express their will through chosen representatives in Congress or Legislature assembled. In some quarters this sentiment has taken very definite shape, and ominous threats are made, extending even to the obliteration of the court by whose judgment, it is said, the will of the sovereign people is thwarted.

Political writers of reputation have given to this movement the aid, which character and scholarship carries; and we who believe that the way established by the Fathers of the Republic is the better way, are called upon to defend propositions which for nearly a century have passed current and with little challenge.

Convinced that the prevalent scepticism of the advantages of our Constitutional System is due in great measure to a forgetfulness of the fundamental principles upon which all free government rests, it is proper to recall the essential distinction in theory between our government and those of the countries from which our forefathers emigrated. This distinction is sharply brought to mind when the words "citizen" and "subject" are contrasted. In lands where the inhabitants are "subjects," the government is an entity existing apart and distinct from the people. There is a "sovereign power" which exists in contradistinction to the people governed. This sovereign power may be exercised by an emperor, a czar, a king or a parliament; in either case, an individual or a limited number of individuals is assumed to possess sovereignty over the mass who are governed.

Tradition, custom, fear of rebellion, may restrain the sovereign in the exercise of power, but the individual men who constitute the nation are subjects of that sovereign.

The land from which we derive our language—the great body of our laws and the fundamental principles of

our liberties was governed by a sovereign. Parliament, composed of King, Lords and Commons, was a sovereign governing power—restrained, it is true, by tradition, custom, and knowledge that the governed knew how to rebel, and dared to fight, if need be, to protect their rights as freemen—but still an absolute power. From time to time protests were heard against this absolutism.

A few English judges have intimated that an act of Parliament against Common Right was void; but the accepted opinion has been, that Parliament absorbs to itself all the Supreme Powers of Government;—legislative, executive and judicial. There is no appeal within the law against an edict of Parliament. To reverse it, there must be rebellion, only to be justified upon general provocation and ability to carry to a successful end.

In his address at New York on the fiftieth anniversary of the Federal Constitution, John Quincy Adams said this doctrine of absolutism of Parliament was the moving cause of our war of Independence:

“The English lawyers had decided that Parliament was omnipotent—and Parliament in its omnipotence instead of trial by jury and the *habeas corpus*, enacted Admiralty Courts in England to try Americans for offences charged against them as committed in America. . . .

English liberties had failed them. From the omnipotence of Parliament the colonists appealed to the rights of men and the omnipotence of the God of battles.”

This spirit of the war of Independence was never more forcibly expressed than in the words which Charles James Fox placed in the mouth of the rebellious subjects of James II.:

No, you have no property in dominion; dominion was vested in you, as it is in every Chief Magistrate, for the benefit of the community to be governed—it was a sacred trust delegated by compact;—you have abused that trust—you have exercised dominion for the purposes of vexation and tyranny—not of comfort, protection and good order; and we therefore resume the power which was originally ours. We recur to the first principles of all government—the will of the many—and it is our will that you shall no longer abuse your dominion.

Independence having been established by our fathers, the government under which we live, repudiated not only the

nomenclature but also the essential theory of government as understood and enforced in the Old World. There is no omnipotent person or body whose edicts control the people. The divine right of the sovereign gave place to the divine right to be free. The governed and the governors are one. The body of freemen are the source of all power. Every freeman is a citizen, and happily every man is now a freeman.

There is no sovereign power which can limit, control, or abridge the exercise by each freeman of the fundamental rights of life, liberty and pursuit of happiness, which include the acquisition, possession and enjoyment of property.

But while "the people" are recognized as the source of all governmental power, we must be mindful not to be misled by the flattering metaphors of orators as to the powers of the "sovereign people." In a limited sense, which we will seek hereafter more carefully to define, the people are sovereign; but the phrase, as commonly used, has led to many erroneous conclusions and deductions. It is certainly illusive when it induces each of an audience to whom it is addressed to regard himself as a "sovereign," possessing the prerogative, either individually or in association with other like "sovereigns," to exercise arbitrary or absolute power over the property or rights of his fellow-citizens; and the phrase "sovereign people" is equally objectionable when it is used to give support to the idea that a majority of the voters of a state possess, in an absolute sense, power to control or direct the conduct, or abridge the natural rights of freemen. The unlimited despotism of a majority is the most dangerous form of tyranny.

In 1802, a distinguished senator noticed this insidious flattery of the "sovereign people" in these words:

I hope, however, that the government and the people are now the same, and I pray to God that what has been frequently remarked may not, in this case, be discovered to be true; that they who have the name of the people most often in their mouths, have their true interest most seldom at their hearts.

The majority of voters are not a "sovereign power," and the nation at large does not bear to that majority the relation which subjects bear to a sovereign.

While there is a sense in which we may regard the people as sovereign, there is, also, high authority for a dignified reserve in using the phrase.

Justice JAMES WILSON, in *Chisholm v. Georgia*, 2 Dallas, 257, said :

To the Constitution of the United States, the term *sovereign* is totally unknown. There is but one place where it could have been used with propriety. But, even in that place, it would not, perhaps, have comported with the delicacy of those who ordained and established that Constitution. They *might* have announced themselves "sovereign people of the United States;" but, serenely conscious of the fact, they avoided the ostentatious declaration.

The only sense in which the use of the word "sovereign" is permissible, even when annexed to people, is to emphasize the thought that a nation of freemen recognize no sovereign power other than the Constitution, and laws made pursuant thereto, which, by common consent, have been established and enacted, to the end that each freeman may more perfectly enjoy his liberty and attain, in the largest measure, the exercise of his natural rights. As was well said by Caleb Cushing, in the House of Representatives :

We did not constitute this government as the means of acquiring new rights, but for the protection of old ones which nature had conferred upon us, which the Constitution rightly regards as pre-existing rights, and as to which all the Constitution does is to provide that these rights—neither you—nor any power on earth shall alter, abrogate or abridge.

Free government exists not to control the actions of its citizens as subjects—but to enable each man to enjoy his own without let or hindrance, and to protect from the encroachments of the lawless, those who are willing to live with due recognition of the natural rights of others. In this sense only the people are sovereign, that in them as an entirety, is the source of the power conferred by common consent upon certain governmental agencies to be exercised in accordance with the terms of the grant for the common good.

The act of the people in framing a scheme of government properly may be spoken of as the act of a "sovereign power." It was consummated in the adoption of the Federal Constitution. As John Quincy Adams said, "The constituent sovereignty of the people was the basis of the Constitution."

The congress upon which legislative power was conferred did not thereby acquire "sovereign powers." There was only a delegation of the power of enacting laws—of exercising the legislative power upon the subjects which are within the scope of national government as distinguished from state government; matters concerning the people of the United States and not the people of the several states. This assertion is not made to support any doctrine of "strict construction." That is a mere question of detail. For the purposes of this discussion we concede the broadest construction which any rational mind can give to the final sentence in Article I § 8 of the Federal Constitution.

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof.

The proposition which we maintain is that all legislative powers exercised by Congress or state legislatures are delegated powers, and hence must be exercised in accordance with the terms of the instrument conferring the powers.

The source of power is the people, who in this sense are sovereign—the government is of the people—but having established, through the Constitution, a government of limited powers, and delegated to proper governmental agencies the exercise of those powers—and having further provided for the continued existence of those agencies through successive elections and appointments, the sovereign power rests.

The elections which from year to year are conducted in accordance with constitutional requirements are not the exercise of sovereign power. The body of the people bound themselves in the Constitution to accept as servants for the performance of official duty those whom a majority of lawful voters might name for the service. Not only are those elected, agents of the people, exercising delegated powers, but the majority of the electors, who name those thus elected, are themselves exercising a power delegated in the Constitution by the entire body to the electors. In legal effect the Constitution is a continuing compact;—in some respects

very analogous to a partnership agreement. For certain purposes the entire body agree that the act of the majority shall bind all. In so acting the majority are the agents of the entire body, and their act is efficient not as an exercise of sovereign power, but because by the frame of government all have agreed that elections shall be so held.

This doctrine of the delegation of power is as applicable to the state as it is to the federal legislative body.

PENNA. CONSTITUTION of 1776. Chapter I.

§ IV. That all power being originally inherent in and consequently derived from the people, therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.

§ V. . . . And that the community hath an indubitable, unalienable and indefeasible right to reform, alter or abolish government, in such manner as shall be by that community judged most conducive to the public weal.

CONSTITUTION of 1790. Preamble.

We, the people of the Commonwealth of Pennsylvania, ordain and establish this Constitution for its government.

ARTICLE I. § I.

The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives.

ARTICLE IX. § II.

That all power is inherent in the people, and all free governments are founded on the authority, and instituted for their peace, safety and happiness. For the advancement of those ends they have, at all times, an unalienable and indefeasible right to alter, reform or abolish their government, in such manner as they may think proper.

§ XXVI. To guard against transgressions of the high powers which we have delegated *we declare* that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate.

The same propositions are found in the Preamble of the Constitution of 1873 and in the Declaration of Rights, Article I, § I and § XXVII.

A precedent for limitations upon legislative power is found in the Royal Charter for the Province of Pennsylvania granted to William Penn, where the legislative power of the Provincial Assembly is thus qualified; after the clause in which the law-making power is conferred is the following proviso:

Provided, nevertheless, that the said laws be consonant to reason, and be not repugnant or contrary, but (as near as conveniently may be) agreeable to the laws, statutes and rights of England.

Similar limitations are found in other colonial charters.

These preliminary suggestions are made not for the purpose of particularly defining the extent of the powers of Congress or state legislature, but to emphasize two cardinal principles.

First.—The body upon whom legislative power is conferred is not a sovereign or omnipotent body. It is an assembly of agents or trustees to whom the body of the people have delegated the duty of legislation. The people remain the ultimate source of power, in them alone is vested the constituent sovereignty. The extent of the power thus delegated is to legislate, one of the independent functions of government, but not the attribute of sovereignty or absolute government.

Second.—The power of legislation has not been conferred without limitations. In the case of the National Congress no general power to legislate has been conferred, and by the terms of the instrument defining the extent of the powers, none pass except those expressly mentioned, and such as are properly incidental to render effectual those expressly conferred.

In the case of state legislatures, the powers of legislation conferred are to legislate generally. But from the earliest Constitution, as is shown by the preceding quotations, the Bill of Rights operated as a limitation upon the otherwise general legislative power. We fully recognize the distinction between the construction of the federal and state constitutions. One body is of limited and the other of general legislative powers; but the general powers of the state legislature are subject to many expressed restrictions,

and perhaps more important than all, it is always to be remembered that the powers of Congress and the powers of state legislatures are legislative only. Legislation must be distinguished from a general exercise of sovereign power. A body to whom only the duty of legislation has been delegated does not thereby acquire sovereign power. It is not legislation to decree that the property of A shall become the property of B. Such an enactment is void, not because of any constitutional prohibition or limitation, but because it is not legislation. Examples could be multiplied, a single illustration is sufficient. A sovereign parliament might possess absolute and arbitrary power. A legislature convened to legislate does not. When any legislative body transcends the limit of legislation, Lord Chatham's words in questioning the arbitrary exercise of power by the House of Commons well apply:

Tyranny is detestable in every shape, but in none so formidable as when it is assumed and exercised by a number of tyrants.

In *Sharpless v. Philadelphia*, 21 Pa., St. 147, Black, Woodward and Knox pointed out this limitation upon legislative action with great clearness.

BLACK, C. J., p. 167.

Perhaps there is nothing in the books which shows the tenacity with which the court has adhered to the letter of the Constitution in determining the extent of legislative power, more plainly than the doubt which was once entertained (10 Watts, 63) whether the want of an express inhibition did not permit the Assembly to take one man's property and give it to another. The Constitution *does* prohibit it. It is not within the general grant of legislative power. It would be gross usurpation of judicial authority, and would violate the very words of Section XI, Art. IX. The legislature could not make such a rescript (for it would not be law), any more than they could order an innocent man to be put to death without trial.

P. 168.

I do not mean to assert that every act which the legislature may choose to call a tax law is constitutional. The whole of a public burden cannot be thrown upon a single individual, under pretence of taxing him, nor can one county be taxed to pay the debt of another, nor one portion of the state to pay the tax of the whole state. These things

are not excepted from the powers of the legislature, because they did not pass to the Assembly by the general grant of legislative power. A prohibition was not necessary. An act of Assembly, commanding or authorizing them to be done, would not be a law, but an attempt to pronounce a judicial sentence or order or decree. . . .

Neither has the legislature any constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. No such authority passed to the Assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation and becomes plunder. Transferring money, from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them.

In this case, the court held that public money raised by taxation might be applied to aid the building of a railroad, because the use was public; but in *Loan Association v. Topeka*, 20 Wallace, 655, it was pointed out that public moneys could not be applied to the aid of a manufacturing enterprise—MILLER, J., saying :

Where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power.

KNOX, J., p. 185. The right of this court to declare an act of the legislature unconstitutional, is unquestionable, and I may safely add, unquestioned.

In ascertaining whether there has been this clear usurpation by the law-making power, I agree with the Chief Justice, and Mr. Justice WOODWARD, that the tests to be applied are: *First*—Is the act in the nature of a legislative power? *Second*—Does the Constitution expressly, or by necessary implication, forbid the exercise of such power?

The two questions are closely assimilated. If it is not in the nature of a legislative power, the Constitution does, by necessary implication, forbid the General Assembly from exercising it. All attempts upon the part of the legislature to exercise the class of powers committed to the care of the judiciary, are clearly unauthorized and unconstitutional. For there is a necessary implication arising from the organization and recognition of the judicial branch of the government, that its authority shall be supreme, and its jurisdiction exclusive upon subjects committed to its care and upon questions to be determined by its judg-

It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognizes no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic of power, is after all but a despotism. It is true that it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

A clear apprehension of the rule, that the enactment by a legislative assembly must be legislative in its nature, in order that it may be of force, renders it unnecessary to discuss the question, whether legislation not expressly prohibited, but in violation of what is styled common right, is void. Cases are often suggested which shock the sense of natural right and yet which do not come within any express prohibition of the Bill of Rights or of the Constitution. The

ment. Hence the legislature cannot lawfully grant a new trial in a case once determined. This court might with equal right declare, that a bill which has passed through all the forms of legislation should again be submitted to a vote of the Senate and House of Representatives, and presented to the Executive for his approval or rejection, as for the legislature to say that a verdict of the jury, and a judgment of a court should be set aside, in order to give the parties litigant another opportunity to ascertain where right and justice belong.

It is unnecessary to multiply instances or words to prove that the legislature cannot rightfully exercise judicial or executive authority. It is confined to its own sphere of action, separate and distinct from the other departments of the government.

WOODWARD, J., p. 158. When the legislature disregards the distribution made of the powers of government, among the three co-ordinate departments, or the restrictive clauses in the body of the instrument, or the reservations of the Bill of Rights, or the grants of the Government of the United States—the judiciary, whose office it is to expound the law, may, and I hold are bound to declare the act unconstitutional and void.

true solution of most of these cases is that the attempted act of the legislature is not legislation. It may be an encroachment on the prerogative of the executive. It may be an attempt to exercise judicial powers. It may be an act beyond the power of free government. If it come not within the definition of legislation, it is of no force. If, however, the act be legislative in its character and not prohibited by some express provision of the Constitution, then the legislature alone is responsible for the exercise of its discretion—then the discretion having been exercised, no other department of government can review the question and refuse obedience to the law enacted by the body to which under our form of government the law-making power has been delegated.

From the foregoing it would appear that legislative enactments are of no force:

1. When prohibited by the express language of the Constitution.
2. When under the guise of legislation, statutes not legislative in their character are promulgated.

Such edicts or rescripts are not within the chart of legislative authority and do not carry with them the duty of obedience. But how is this question of duty to be determined. How, when the interest of one calls for the enforcement of such enactment and the interest of another denies its validity, is the issue to be settled.

In his famous dissenting opinion in *Eakin v. Raub*, 12 S. & R., 330, in denying the power of the judiciary to declare a statute of no force, because unconstitutional, Judge GIBSON was driven to the conclusion that in cases really affecting the vital interest of the citizen, his only recourse was to determine the issue for himself and to take the personal responsibility of resisting, even to the death the enforcement of a statute which was not law.

The right is peremptorily asserted and examples of monstrous violations of the Constitution are put in a strong light by way of example; such as taking away the trial by jury, the elective franchise, or subverting religious liberty. But any of these would be such a usurpation of the political rights of the citizens, as would work a change in the very structure of the government; or, to speak more prop-

erly, it would itself be a revolution, which, to counteract, would justify even insurrection; consequently, a judge might lawfully employ every instrument of official resistance within his reach. By this I mean, that while the citizen should resist with pike and gun, the judge might co-operate with *habeas corpus* and *mandamus*. It would be his duty, as a citizen, to throw himself into the breach, and, if it should be necessary, perish there.

The opposite view is most tersely put in an early Georgia case. I refer to the opinion of Judge CHARLTON in *Greenfield v. Ross*, Charlton's Report, 176.

From passion, from unprincipled ambition, from the illusions of ignorance, from the ebullition of political acrimony or misguided zeal, it is very easy to perceive the possibility of an unconstitutional act of the legislature. What, then, is the remedy? A recourse to the people's vengeance? Must the people be called upon to defend, in their aggregate capacity, that compact and those privileges which flowed directly from the source of their volition? If this is the remedy, our boasted republicanism is nothing more than systematic anarchy; and it would be therefore better for us to repose in the thorny protection of an absolute monarchy. Is the remedy found in the patient endurance of the evil until succeeding legislatures think proper to repeal the unconstitutional enactment? This would be worse than popular insurrection, because it presupposes an outrage upon the constitutional rights longer than ought to be borne by American citizens. The remedy can only be found, then, in the wisdom and independence of the judicial department. Here the passions, the feelings and the interests which may and do sway deliberative bodies cannot be found. This department is aided by all the lights which cautious and dispassionate consideration can afford; and it is governed by maxims of jurisprudence which *aperitis foribus* offer a secure asylum to every citizen whose weakness or injuries solicit admission and protection. This department cannot deviate from those fixed principles which for ages the approbation of mankind has stamped with the seals of truth and authority. In this respect the judicial is unlike the legislative department, whose functions are regulated by the caprice of an arbitrary discretion. Under this view of the judicial department it is surely the best, the safest, and in our republic can be the only mediation between a citizen and an unconstitutional act of the legislature.

The heresy, contained in his dissenting opinion, our great Chief Justice subsequently recanted in *Menges v. Wertman*, 1 Pa. St. 218, saying:

In the other states the courts have often pronounced acts of legislation to be unconstitutional, with the acquiescence of the legislature and

the people. But by giving too much scope to the principles that this authority is to be exercised only in extreme cases, we have bound our hands so far as to have nearly relinquished the authority itself. It would ill become me to impute blame for it to the distinguished men who have preceded me, or to those with whom I am or have been associated; for it is known that I went beyond them in restricting the constitutional power of the court. My theory, however, seems to have been tacitly disavowed by the late convention, which took no action on the subject, though the power has notoriously been claimed and exerted. But experience has taught me the futility of mere theory. There must be some independent organ to arrest unconstitutional power. It would be useless for the people to impose restrictions on legislation if the acts of the agents were not subject to revision.

The same sentiment was expressed from the Bench in the report of the argument in *Norris v. Clymer*, 2 Pa. St. 277.

It is a striking coincidence that when Judge GIBSON was driven from his original position by the argument of the necessity of the case, he followed the line of reasoning adopted by Mr. Calhoun in one of his great arguments in the Senate:

But it will be asked how the court obtained the power to pronounce a law unconstitutional when it comes in conflict with that instrument. I do not deny that it possesses the right, but I can by no means concede that it was derived from the Constitution. It had its origin in the necessity of the case. Where there are two or more rules established, one from a higher, the other from a lower authority, which may come into conflict in applying them to a particular case the judge cannot avoid pronouncing in favor of the superior against the inferior. It is from this necessity, and this alone, that the power was derived. It had no other origin. That I have traced it to its true source will be manifest from the fact that it is a power which so far from being conferred exclusively in the Supreme Court as is insisted, belongs to every court, inferior and superior—state and federal.

This quotation is most instructive because it emphasizes the important principle that courts in passing upon the constitutionality of statutes exercise a purely judicial function. Their judgment is entered in the particular case upon a definite issue raised whether a certain legislative enactment is law, and the court must decide that issue in order to give judgment between the parties.

Strictly speaking, the judgment binds no one except the

parties. The statute is not repealed or annulled by the judgment of the court. It still has its place in the statute book, but the court judicially determines that while the statute has the form of law, it does not affect the rights of the litigants who invoke the higher law of the Constitution. But although the court does not override the legislature, the moral force of its decision may be prevailing—it gives promise that if the same issue is raised between other litigants the same judgment will be entered. The judicial branch of the government comes into no conflict with the legislature—each continues to move in its appointed course. This is the true view of the judicial function. While it may not place the judiciary in apparent elevation as a Court of Appeal above the legislature—the constant recognition of the limited effect of the judicial judgment will tend to conserve the true influence of the courts. The substance not the form of power should be desired. The less the appearance, the longer will it continue.

In the earlier history of the states, the courts were rarely called upon to declare acts of the legislature unconstitutional. In our Commonwealth for the half century following the Constitution of 1790 there is not a single instance where a statute was determined to be unconstitutional—but there was a uniform consensus of judicial opinion (with the exception of the dissenting opinion of C. J. GIBSON already quoted) that the judiciary must have the power of declaring a statute to be of no force, if enacted in disregard of the higher law of the Constitution.

In the minutes of the Council of Censors in 1784, the committee appointed to point out the defects in the Constitution of 1776, *inter alia* reported :

Your committee conceives the said Constitution to be in this respect materially defective, referring to the power of the legislature to remove the judges :

Because if the assembly should pass an unconstitutional law, and the judges have virtue enough to refuse to obey it, the same assembly could instantly remove them.

This indicates that the men who took part in forming our government had a very definite opinion that an unconstitutional law was no law—and that the test of virtue in a

judge would be his refusal to obey it—by which we understand that in the performance of his judicial duty he should give it no effect in rendering judgments.

I shall not attempt to refer to the numerous cases in which the courts of the several states committed themselves to the right of the judiciary to declare an unconstitutional law to be of no force. There is a full collection in Mr. Meigs' article "On the Relation of the Judiciary to the Constitution," *American Law Review*, March-April, 1885, p. 175, etc., and Professor Thayer's article—"The Origin and Scope of the American Doctrine of Constitutional Law," *VII Harvard Law Review*, 129.

I refer only to the striking charge of Judge PATERSON in the U. S. Circuit Court for this district, in 1795,—*Van Horne's Lessee v. Dorrance*, 2 Dallas, 304, when he said :

What are legislatures? Creatures of the Constitution; they owe their existence to the Constitution; they derive their powers from the Constitution; it is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the people themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature. The Constitution fixes limits to the exercise of legislature or legislative authority, and prescribes the orbit within which it must move. In short, gentlemen, the Constitution is the sun of the political system, around which all legislative, executive and judicial bodies must revolve. Whatever may be the case of other countries, yet in this there can be no doubt—that every act of the legislature, repugnant to the Constitution, is absolutely void.

And the opinion of C. J. TILGHMAN, in *Eakin v. Raub*, 12 S. & R., 330:

It will be sufficient to say, that I adhere to the opinion which I have frequently expressed, that when a judge is convinced, beyond doubt, that an act has been passed in violation of the Constitution, he is bound to declare it void, by his oath, by his duty to the party who has brought the cause before him, and to the people, the only source of legitimate power, who, when they formed the Constitution of the state, expressly declared that certain things

"Were excepted out of the general powers of government, and should forever remain inviolate."

The people declared also on their adoption of the Constitution of the United States :

"That it should be the supreme law of the land, and that the judges in every state should be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Upon this subject I have never entertained but one opinion, which has been strengthened by reflection, and fortified by the concurring sentiments of the Supreme Court of the United States, as well as of lawyers, judges and statesmen of the highest standing in all parts of the United States of America. Nevertheless, the utmost deference is due to the opinion of the legislature,—so great, indeed, that a judge would be unpardonable, who in a doubtful case should declare a law to be void.

And Judge DUNCAN in the same case :

Maintaining, as I do, the power and the duty of the court to decide upon the constitutionality of all acts of the legislature, yet it is one which all courts will approach with caution and circumspection, and with every proper respect for a co-ordinate branch of the government, and with great reluctance will they pronounce an act of the legislature unconstitutional, and only where it comes in undoubted collision with the Constitution of the United States, or with that of this state. But it is a duty, however irksome, which they are bound to perform, without regard to personal considerations; for no principle can be better established—none more conducive to personal liberty and security of property,—none of which the people of this free country can more justly boast,—none which so pre-eminently distinguishes our American Constitution over every other country and government, than the doctrine which has prevailed since the formation in the courts of all these states, from Maine to Georgia, that the people possess the sovereign right to limit their lawgiver, and that acts contrary to the Constitution are not binding as laws. The concurrence of statesmen, of legislators and of jurists, uniting in the same construction of the Constitution, may insure confidence in that construction.

Even C. J. GIBSON, in the dissenting opinion before cited, recognized that the limitations of the Federal Constitution must be enforced by the courts, distinguishing that from the State Constitution because of the provision.

In *Marbury v. Madison*, 1 Cranch, 137, MARSHALL, C. J., settled the law for all time in the federal courts :

The question, whether an act, repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to

their own happiness is the basis on which the whole American fabric has been created. The exercise of this original right is very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designated to be permanent.

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The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people, to limit a power in its own nature illimitable.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret the rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that the courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory, it would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict

their powers within narrow limits, it is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient in America, where written constitutions have been viewed, with so much reverence, for rejecting the construction. . . .

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.

And there is no better statement of the rule than in the opinion of the several judges of our Supreme Court in *Sharpless v. Philadelphia*, 21 Pa. St. 147.

BLACK, C. J., p. 160. The powers bestowed on the state government were distributed by the Constitution to the three great departments: the legislative, the executive, and the judicial. The power to make laws was granted in Section I of Art. I, by the following words: "The legislative power of this Commonwealth shall vest in a general assembly, which shall consist of a Senate and House of Representatives." It is plain that the force of these general words, if there had been nothing else to qualify them, would have given to the Assembly an unlimited power to make all such laws as they might think proper. They would have had the whole omnipotence of the British Parliament. But the absolute power of the people themselves has been previously limited by the Federal Constitution, and they could not bestow on the legislature authority which had already been given to Congress. The judicial and executive powers were also lodged elsewhere, and the legislative department was forbidden to trench upon the others by an implication as clear as words could make it. The jurisdiction of the Assembly was still further confined by that part of the Constitution called the "Declaration of Rights," which, in twenty-five sections, carefully enumerated the reserved rights of the people, and closes by declaring that "everything in this article is excepted out of the general powers of the government, and shall remain forever inviolate." The General

Assembly cannot, therefore, pass any law to conflict with the rightful authority of Congress, nor perform a judicial or executive function, nor violate the popular privileges reserved by the Declaration of Rights, nor change the organic structure of the government, nor exercise any other power prohibited in the Constitution. If it does any of these things, the judiciary claims, and in clear cases has always exercised, the right to declare such acts void.

WOODWARD, J., p. 179. The striking peculiarity in the civil and political condition of the people of this country, is that they live under the jurisdiction of two separate and distinct governments both formed by themselves, and the powers of each limited by written constitutions. The people of Pennsylvania, made absolutely free, sovereign, and independent, on the fourth day of July, 1776, settled for themselves a frame of government which, as modified in the present Constitution, organizes the various departments of a republican government, legislative, executive, and judicial; and vests in them, not specific and enumerated powers, but legislative power, executive power, and judicial power. Whatever is in the nature of these three governmental powers (and for their nature we must refer ourselves to the principles of political science) belongs to these departments respectively, but not without limitations. The Bill of Rights is a series of reservations out of the powers granted to these departments, and concludes with a solemn declaration in these words: "To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate." The primary questions, therefore, that arises upon the constitutionality of an act of assembly, are first: Is it in the nature of legislative power; and secondly, does it trench upon any of the reservations in the Bill of Rights? If the first of these questions can be answered affirmatively, and the other negatively, the resulting conclusion is that the act is constitutional. So far in regard to the State Constitution. . . .

P. 183. I have no doubt of the right and duty of the judiciary to declare a law unconstitutional, when it clearly contravenes any of the provisions of the State or Federal Constitution; but it is a power to be exercised with great caution. For nearly fifty years of our political existence, under the Constitution of 1790, no act of Assembly was set aside for unconstitutionality. Judges claimed the power, and said they would exercise it in clear cases, but in all that period no case arose which, in their judgment, was clear enough to justify the exercise of the power; and it is well known that that great light of this bench, so recently extinguished, stood opposed, for many years, to the existence of any such judicial power. Since the Constitution of 1838 was adopted, several acts of assembly have been declared unconstitutional, but they were all clear cases.

Although there is a line of cases in various states, and in some of the federal courts, in which acts of the legis-

lature have been declared unconstitutional as violative of common right without reference to any particular clause of the Constitution; careful examination will show that the real ground of objection to the statute declared void was that it was not legislative in its tenor, and the judgment of the court would have been better supported had this reason been given; reference is made to several of these cases in the opinion of BLACK, C. J., already quoted (21 Pa. St., 162).

The citations which have been made show, that the men whom we are taught to reverence as the sages of American constitutional law did not doubt the power of courts, in settling the rights of litigants, to treat as null legislative acts promulgated in disregard to the limitations, which the people have placed upon the powers of those to whom our earliest Constitution in defining the relations of officials to the people, fittingly referred as

All officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.

When due recognition is given to these principles, the community will truly recognize that

Mankind made a long step—a great stride when he declared that minorities should not rule—a still higher and nobler advance had been made when it was decided that majorities could only rule through regular and legal forms.

The true theory of Constitutional Government as against the unlimited power of the legislature or of a law-making majority, has never been more clearly stated than in the words of the great statesman to whom I have already referred.

I know that it is not only the opinion of a large majority of our country, but it may be said to be the opinion of the age, that the very beau ideal of a perfect government is the government of a majority acting through a representative body, without check or limitation on its power . . . but

The necessary tendency of all governments based upon the will of an absolute majority without constitutional check or limitation of power, is to breed corruption, anarchy and despotism; and this whether the

will of the majority be expressed directly through an assembly of the people themselves or by their representatives.

The government of the absolute majority instead of being the government of the people is but the government of the strongest interests, and when not efficiently checked is the most tyrannical and oppressive that can be devised.

To maintain the ascendancy of the Constitution over the law-making majority is the great and essential point on which the success of the system must depend. Unless that ascendancy can be preserved, the most necessary consequence must be that the laws will supersede the Constitution.

That I may not seem to place too much stress on the views of a statesman, some of whose opinions have not stood the stress of time, I would add to the words of Mr. Calhoun, a brief quotation from one who, on the distinctive issues of their day, was altogether opposed to him :

This annihilation of the individual by merging him on the state lies at the foundation of despotism. The nation is too often the grave of the man. This is the more monstrous because the very end of the state, of the organization of the nation, is to secure the individual in all his rights, and especially to secure the rights of the weak. Here is the fundamental idea of political association. In an unorganized society with no legislature, no tribunal, no empire, rights have no security. Force predominates over rights.

W. E. CHANNING.

After the judiciary has done its part there still remains a wide field for legislative action in making effectual the constitutional guarantees of successful free government.

We have heard much of the indifference of legislators to constitutional limitations. By some this indifference is attributed to a prevailing sentiment that such questions are for the courts. This is a radical error. We have already seen that by some high authorities the duty of the judiciary has been founded on the obligation of their oaths to support the Constitution. The same oath has been taken by every legislator, and no man is worthy to sit in any American legislative body upon whose conscience that oath does not rest with binding force, and upon whose official conduct the principles of the Constitution are not ever present as the controlling governor. We must not hide from ourselves the

knowledge that the intense interest which our people have taken in the material development of the state and the absorbing devotion to bettering their physical condition has distracted the minds of the community too much from attention to the principles of free government. It is in no spirit of criticism I refer to this. We all know that in our own professional lives, our attention is largely absorbed in controversies and consultations in which the public aspect of the laws have but little part. Recognizing this truth, the time spent in this meeting will not have been wasted if our minds are recalled to a serious contemplation of the fundamental principles of free government, the perpetuation of which is the only pledge for a continuation of the conditions under which our material interests will prosper in the future as they have in the past. The Legislature of Pennsylvania has always been largely composed of lawyers. If the lawyers of that body would carry with them a due sense of responsibility and check all legislation which, upon its face, clearly violates constitutional provisions, the courts would be relieved from cases, the constant determination of which brings the legislature into public contempt.

But the function of the legislature in giving effect to the Constitution is not limited to refraining from legislation which the courts will nullify.

As has been already pointed out, the power of the State Legislature in the field of legislation is without qualification, except in so far as expressly restricted by constitutional prohibition. Within the delegated field their discretion is untrammelled, and not subject to review; upon the members of the legislative body rests the ultimate responsibility, for a faithful adherence to the principles of free government. The possibilities of legislative power are sufficiently great to permit wide departure from the traditions of the men who founded our states, without stepping beyond constitutional lines. The genius of free institutions may be destroyed without impairing the guarantees of the written Constitution. We have inherited traditions for whose preservation we must rely upon the legislature. In an age of great intellectual activity, when speculative thought has become deeply interested in governmental and economic problems, it is easy

for the legislature, while still within the terms of our written Constitution, to be regardless of principles which have heretofore controlled. A new generation has come to think that a nation can be reformed by the machinery of new laws; and each session of the legislature is flooded with bills, some of which become laws, whose purpose is to establish rules of conduct, which do not conform to the habits of thought or action of the great body of the community. Such laws are a nullity—not by judicial judgment, but by the common consent of the people. They stand on the statute book a dead letter, and by their existence tend to destroy public respect for law. If any lesson can be learned from the history of democracy, it is—that statutes must substantially express the common conscience of the community; it is possible that in governments where there is a sovereign power other than the people, statutes may be enacted to educate the community to higher standards—such is not the history of true growth in a democracy—the reform must first come into the life of the people, then it may find expression in statutes.

The functions of government in a democracy should be few.

The government is best which allows the largest amount of individual liberty compatible with good order and tranquillity . . . and improvement in political science will be found to consist in throwing off many of the restraints enforced by law and once deemed necessary to an organized society.

In the Bill of Rights is this clause :

No man can of right be compelled to attend, erect or support any place of religious worship, or to maintain any ministry against his consent.

All recognize that by freedom from enforced support—the revenues of religious societies have been largely augmented.

In this there is a lesson which can be properly applied. Legislative appropriations to charities have been greatly increased during the last decade. While there are certain dependent classes for whose support the state may properly appropriate public funds or provide institutions for their care, the legislature will best conserve the spirit of free insti-

tutions by leaving charities generally to the individual care of its citizens. While worthy institutions might feel the sudden withdrawal of state aid—the history of charities which have never received any aid from the public treasury shows that to them flows the stream of private beneficence which immediately turns in large measure from those having the support of the state.

Under guise of the exercise of the police power bills are introduced at each session of the legislature which while they may not violate the letter of the Constitution tend to make the body of the people impotent, without manhood, self-reliance or any of the attributes of freemen. We all recognize that as communities become dense, the legislature is properly called upon to adopt new regulations to protect the lives, health and property of citizens living in thickly populated communities. Subjection to such rules and regulations is the only condition upon which life can be comfortably and safely maintained, and every man who locates himself in such community surrenders some part of his individual liberty in consideration of the restraint which law places upon his neighbors for his protection—but the exercise of the police power is one which always calls for the highest political discretion upon the part of law-makers. Laws must not exceed the reasonable standard which the common sentiments of the community demand, else the government assumes to the people the attitude of an external sovereign and the sentiment of freedom and independence dies. The law should never undertake to supply a community with anything better than they can win for themselves, else the recipients of the law's good things, become accustomed to look to it rather than to themselves for the comforts of living. In all this class of legislation, the legislature has full scope for the exercise of a wise discretion.

This category could be enlarged, but further discussion of detail is unnecessary, the principles have been illustrated. Every effort which tends to elevate the standard of our political and social life should receive the support of all right-thinking citizens, but if we have read history aright we have learned that the only forces which work efficiently towards such elevation are those which reach and renovate

the character of the individual citizen. To promulgate a law prescribing a rule of action not according with the daily life and standards of the body of the people is worse than an idle form. That statute becomes merely a dead letter, and the administration of the law is brought into contempt. Our national, state and municipal life has much still to gain. We know it is far from perfect, but the remedy is not in framing statutes based upon ideals which are not those of the people. The advance can only be made when the people have themselves absorbed the idea and seek to realize it. To excite the desire for such higher standard is the true work of reformers, but the work will never be effectually done until there is a recognition that the agencies of government have none of the attributes of sovereign power. That the source of all governmental power is in the "governed," and that laws are effectually enforced only when they express the will of the freemen who live under them.

Every reflecting man will admit that a legislator who knows the clauses of the written Constitution, and who is imbued with the spirit of those unwritten constitutions which are synonymous with free institutions, has full field for the exercise of an intelligent discretion in the performance of his duty not as a member of a "sovereign body," but as a "trustee and servant" of the people, remembering that to him and his fellow-servants has been delegated the duty not of government but of law-making, subject to the restrictions expressed in the Constitution.

If legislators would perform their duties in remembrance of these principles there would be little to be done by the judiciary in enforcing constitutional limitations. So long as so-called legislation is enacted in forgetfulness of the Constitution, the judiciary must remain as a bulwark for the protection of the rights of the individual freeman.

I would sum up the results of this paper in these propositions:

First—The judiciary should have the support of the bar in the performance of its highest function, the declaring of statutes to be of no force when in derogation of rights secured by the Constitution or Bill of Rights. The exercise of this power is necessary to maintain the integrity of our

system of government. The other alternatives are passive submission to the unrestrained power of a legislative assembly, the most arbitrary of all tyrannies, or the anarchy which would follow if each citizen should undertake to be the judge of the constitutionality of legislation whenever it seriously ran counter to his interests. The present and coming generation can safely follow Chief Justice Gibson and conclude that the exercise of this power by the judiciary exists, because it is necessary.

Second—It is the duty of the legislature not only to regard the letter of the Constitution and thus relieve the courts of the embarrassing duty of declaring the statute of no force as in violation of constitutional limitations, but every member of the assembly should feel himself charged as the “agent and trustee” of his constituents with the duty of scanning every bill in the spirit of the Bill of Rights, and while recognizing that there is a wide field for legislative activity in the framing of laws which will secure the property, lives, health and general safety of the people; which will enable them to enjoy those blessings for the better securing of which governments exist, he must always remember that we are a nation of freemen, and no law should be inscribed on our statute book which is not in harmony with the principles of liberty and the traditions, customs and daily life of a free people.

Richard C. Dale.

BREACH OF ONE INSTALLMENT OF A DIVISIBLE CONTRACT.

(*Concluded.*)

It was not until 1884 that this question was presented to the House of Lords in *Mersey Co. v. Naylor et al.*, L. R., 9 App. Cases 434. This case is peculiar both in its facts and the opinions therein delivered.

The facts are fully set forth in the report of the decision of the case in the Court of Appeals, L. R., 9 Q. B. D. 648. They were as follows: Naylor & Co., the defendants, agreed to purchase 5,000 tons of steel blooms to be delivered at Liverpool in monthly installments of 1,000 tons, payment within three days after receipt of shipping documents.

The plaintiff's company delivered in January one-half the first installment, but before payment became due a petition was presented to wind up the company. The defendants were advised by their solicitors that they could not, without leave of the Court, safely pay the company pending the petition and asked the company to obtain an order sanctioning the payment. This the company refused to do, and notified the defendants that they would treat the failure to pay as a breach, terminating the entire contract. The case being tried before Coleridge, C. J., he *held* that there had been a refusal to pay, which amounted to a repudiation of the contract, and gave the plaintiffs the right to rescind, saying: "Here the defendants, while insisting upon future deliveries, positively refused to pay for the iron already delivered, and for all which might subsequently be delivered, unless the plaintiffs fulfilled a condition which the defendants in my opinion had no right to impose." In other words, the refusal to pay, if a real refusal at all, related not merely to the amount due for the iron already delivered, but for all which might be delivered during the pendency of the petition, which might, though in fact it did not, include several future deliveries, and so was as much a breach by anticipation as to such pos-

sible future deliveries as it was already an actual breach as to the previous installment.

The decision was overruled by the Court of Appeals, and it is submitted that the more attentive the study of the case the more certain will be the conviction that this action was based upon the different view taken by the upper Court as to the failure to pay, not upon any difference as to the effect of such a "positive refusal" as Coleridge conceived to exist.

All the judges refused to call the defendants' failure to pay, either what was due or what might become due for iron deliverable in future, a refusal, terming it rather "a demur, a delay, a postponement." Selborne, L. J., "a hesitation." Lindley, L. J., p. 666, *held* that so far from evidencing an intention to repudiate the contract as entered into, it showed on the defendants' side an embarrassment as to the possibility of carrying it out, and suggesting a mode of obviating it; in a word, so far from showing a desire to escape performance, it showed rather an earnest effort to do so.¹

The judges all quoted and approved the rule in *Freeth v. Burr* to this extent, *i. e.*, where the actual default showed no intent to evade any obligation under the contract, it could not amount to a breach thereof, though in fact rendered an exact literal performance impossible.

It is the relative conduct of the two parties which weighed with the Court—the defendants, though guilty of a technical breach, desirous of performing their contract if the plaintiffs will only aid them; the plaintiffs earnestly desirous of escaping from a losing bargain. All the opinions leave open the question of the effect of a positive refusal to pay; it is upon the special circumstances that the Court bases its decision.

The House of Lords sustained the action of the Court below, and here again is observable the same preponderating weight attached to the character of the failure to pay as being a mere demur—hesitation, etc., and as not amounting to a positive refusal to carry out a term of the contract—

¹ Sir Charles Russell, now Chief Justice: "The question is, whether there is such a refusal to abide by a material term of the contract as ought to be treated as a refusal to perform the contract." p. 655.

and the same care to restrict the effect of the decision to its own facts, and to leave untouched the effect of an absolute unexplained refusal to perform a term of the contract.

On a close inspection of the opinions the various judges appear to differ on almost every point, and yet arrive finally at a unanimous decision of the case.

Lord Selborne *held* the contract to be entire. Lord Blackburn practically *held* it to be a group of separate contracts, a breach of any of which could affect the others only so far as it evidenced an intention to refuse future performance, such as would amount to a breach by anticipation thereof. Lord Selborne refused to discuss the earlier cases, approving and applying the rule of *Freeth v. Burr* as he understood it. Lord Blackburn distinguished them as cases where the Court, apparently to his mind erroneously, had held the delivery of a certain amount per month to go to the root of the consideration,¹ while Lord Bramwell says "he could not tell why *Hoare v. Rennie* and *Houck v. Muller* have been brought forward as bearing on the case in hand."

Lord Blackburn, while approving of *Freeth v. Burr*, understood it as an application of the doctrine of breach by anticipation to divisible contract, stating it to be of the same effect as *Hochster v. de la Tour*, 2 El. & Bl. 678 (the leading case on that subject), while Lord Selborne took it to be that even though the breach be not of a condition precedent, if the conduct of the party "amount to a renunciation, to an absolute refusal, to perform the contract,"² then the party aggrieved may accept it as reason for not performing his part; in other words, did the circumstances surrounding the breach show any desire to avoid any of the obligations of the contract, or indicate any inability to perform it as a whole, and considering this to be the rule, he, in a critical analysis of the facts, *held* that the defendants' conduct so far from indicating a desire to avoid any of its

¹As before pointed out in *Hoare v. Rennie*, the Court refused to allow the question to be argued, and in *Bowes v. Shand*, Lord Blackburn himself held all stipulations as to time and mode of performance to be essential.

² The contract entire, as he afterward states it to be not of the residue alone.

obligations, on the contrary showed them to be desirous of doing all in their power to fulfill them as fully as was possible; an exact performance being put out of the question by their honest mistake as to the company's power to *accept and receipt* for a payment when due.

Upon only two points is there any practical unanimity of opinion: (1) that the defendants' conduct here did not amount to an absolute refusal to perform their contract, but was a mere hesitation or demur caused by an honest reliance upon mistaken legal advice, and that they in fact, so far from desiring to evade any of their obligations under their contract, were able and anxious to fulfill them, and were suggesting means whereby the difficulty might be escaped; and (2) that the judges and law lords were most careful to restrict their decision to the facts in hand, and to leave untouched the effect of an absolute refusal to pay for any one installment.¹

How far is this case decisive? Does it decide with Lord Blackburn that the contract is not entire, or with Lord Selborne that it is? Is it not, after all, in view of the conflict of views expressed, authority only as its own facts or at furthest facts so similar as to indicate, as also in *Freeth v. Burr*,² L. R., 9 C. P. 208, that the breach is but technical, that the party in fault does not wish to repudiate, or escape from any of his obligations, but is honestly desirous to fulfill them all exactly, and still able to do so in substantial though of course not exact accordance with all of the stipulations of the contract, notwithstanding the technical breach which he has committed, owing to an honest mistake or to some extraordinary position in which he may find himself placed, without fault on his part? All beyond this would appear mere dicta, and, as has been seen, conflicting dicta at that.

¹ Lord Blackburn seems to consider an absolute refusal to pay for one installment could only be of effect as an indication of an intent to refuse future payments, but, as Lord Coleridge pointed out, the refusal here, if a refusal at all, relates to some, if not all, the future installments.

² Where the party refused payment for one installment because of prior delays, claiming the right to hold back one payment to secure himself against future delays, but always announced his intention of finally paying all due.

Undoubtedly in this case justice was done. The plaintiff company had attempted to escape from a losing contract by alleging that it was ended by a technical breach committed by parties earnestly desirous of keeping it in force and anxious to arrive at some way whereby they could carry out their part with safety to themselves; and if it be restricted as authority to its own facts, little can be said in criticism of it as a decision upon the merits of the contestants.

It, however, is open to the same objections urged against *Freeth v. Burr*, though perhaps to a less extent, more effect being given to the character of the defendants' conduct in this case as not amounting to a real refusal, a true breach at all.

Like it, it allows the character of a default to set aside the intention of the parties as expressed in their contract. Sympathy for the hard position of a party innocently in honest difficulties as to how he may safely perform his contract, overrides the necessity for certainty universally recognized as the first essential in commercial contract. In a word, while good justice if restricted to its own facts, it is perilously near bad law.

Scientifically there would seem to be but two positions possible:

That taken in *Hoare v. Rennie*¹ and *Houck v. Miller*,² that the contract being entire, a breach of any part thereof entitles the party aggrieved to terminate so much of the contract as remains executory, and that indicated by Lord Blackburn in *Mersey v. Naylor*, that such contracts are to be construed not as intended to be one entire contract, but rather as separate contracts for each installment to be performed without relation to one another in one instrument, where of course a breach of one can only affect the others when the conduct of the party committing the breach amounts to a breach by anticipation of the others.

Both give effect to the intention of the parties as it appears to the Court from an inspection of the contract; they *differ only in the construction placed by the Court upon the con-*

¹ 5 H. & N. 19.

² L. R., 7 Q. B. D. 92.

tract. Lord Blackburn indicates that such contracts may show an intent under exceptional circumstances to regard the various parts of the contract as essential one to the other, the performance of each as vital to the full enjoyment of all; but he indicates that, as a rule, he would hold each installment as intended to be capable of being performed or broken without affecting the value of the performance of the rest.

As a rule of construction the former appears obviously the more accurate, besides having the support of the weight of authority, including the opinion of Lord Selborne in *Mersey v. Naylor*. The contract is usually for an entire amount, the division of performance relating only to the time and mode of performance. If the parties intended the contract to be not *divisible* but *divided*, it would have been the most simple and obvious plan to draw as many separate contracts as there were to be deliveries, or in some other way indicate that each delivery is without relation to the rest; and last, but most important, a form of contract, apparently not only the best, but the only form appropriate to provide for a constant and regular and orderly supply of goods or market therefor, is taken to mean exactly the contrary, that any amount delivered will be gladly accepted, any amount the vendee may choose to take will be sold.

The contract on its face appears to be for an entire amount. The form is one which appears admirably designed to provide for the sale or purchase of a large amount of goods, while allowing the vendor to provide from the receipts for one delivery, the goods to be afterwards delivered, or the vendee, by the sale of the first installment, to prepare for the payment of the rest, to enable merchants to make sure of a regular supply for the future without having to carry an unnecessarily large stock on hand, or of a market for the future without providing goods perhaps beyond their present capacity; in a word, to provide with certainty for the future without overstraining their present resources, and so to turn over their capital the more quickly. To hold that by such a form of contract they intend that they will supply or accept any one or more installments without relation to the others is to render useless this form of contract.

Of the two views, that of Lord Bramwell in *Houck v.*

Miller seems by far the better; nor, as has been pointed out, would the case of *Mersey v. Naylor* prevent the application thereof to future English cases, save when similar exceptional circumstances existed; and this view of the construction of such contracts, and the effect thereon of an absolute breach of any one installment, has the support of all but a very small minority of the American Courts.¹

Some slight confusion has resulted from an attempt by Mr. Justice Gray to reconcile the English cases, as has been seen hopelessly conflicting, as they are, by a distinction between the effect of a failure to deliver and a failure to pay for one installment.

This attempted distinction is based on a *dictum*² by Lord Selborne in *Mersey v. Naylor*, and with all deference to Mr. Justice Gray, it is submitted upon a mistaken view of the *dictum* in question.²

In Lord Selborne's opinion—it was the order of performance, not the character of it, which prevented the payment from being a condition precedent—he makes no distinction between a failure to pay and a failure to deliver; but he says that since payment for each installment must be after delivery, it cannot be a condition precedent to that part, and what cannot be a condition precedent of a part cannot be of the whole. Had it been agreed that payment should precede delivery, this same reasoning would make payment a condition precedent, and prevent a delivery of one portion being a condition to the right to demand the future payment.

The leading case in the United States is that of *Norington v. Wright*, 115 U. S. 188. The plaintiff had agreed to sell 5,000 tons of iron to be shipped at the rates of "about" 1,000 tons a month, beginning February 1st, the whole to

¹ The case of *Gerti v. Poidebard*, 57 N. J. L. 432, appearing to follow Lord Blackburn's opinion in *Mersey v. Naylor* to its fullest extent.

² It is found on page 439, L. R., 9 App. Cas. He says: "The contract is entire; it is not split by the division of performance into as many contracts as there are to be deliveries." He then says: "It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because delivery was most certainly to precede payment, and that being so, I cannot see how, without express words, it can be made a condition precedent to the subsequent fulfillment of the unfilled part of the contract."

be completed by August 1st. He shipped only 400 in February, 880 in March, 1,571 in April, 850 in May, 1,000 in June, and in July 300. The defendants received and paid for the February shipments, being in ignorance that the full 1,000 tons would not be shipped in that month; but in May, just before the arrival of the March shipment, hearing for the first time of the amounts shipped in February, March and April, they wrote plaintiff's agents that they would refuse the March and April shipments as not being in accordance to contract, and also refused to receive any future shipments.

On the trial,¹ which took place before the decision of *Mersey v. Naylor*, the Circuit Court being of opinion that the defendants had the right to rescind, the plaintiff suffered a "non-suit," which the Court refused to take off. Judge Butler, in a very able oral opinion, placing his opinion firmly upon the ground that the contract being entire till divided, performance by one party cannot be demanded till the other has performed or tendered a performance on his side, and that the contract being "severable" did not advance the plaintiff's position—"to make his position logical, the contract must be held to be not one contract but several distinct independent contracts;" and while he considers that in *Simpson v. Crippin* the English Courts have gone thus far, he refuses to adopt their position, but says it is for the Supreme Court to take such a step if they see fit.²

¹ 5 Fed. Rep. 768.

² This opinion so admirably states the view that such contracts must be governed by the ordinary rules of commercial law, that the following rather lengthy extract may perhaps be pardoned: "The right to rescind a contract for non-performance is a remedy as old as the law of contract itself. Where the contract is entire—indivisible—the right is unquestioned. The undertakings on the one side, and on the other, are dependent, and performance by one party cannot be enforced by the other without performance, or a tender of performance, on his own part. In the case before us the contract is 'severable.' But to say it is 'severable' does not advance the plaintiff's argument. A 'severable' contract, as the language imports, is a contract *liable* simply to be severed. In its origin, and till severed, it is entire, a single bargain or transaction. The doctrine of severableness (if I may be allowed to coin a word) in contracts is an invention of the courts, in the interest of justice, designed to enable

The Supreme Court upheld the action of the Court below, holding in accordance with Lord Selborne¹ that the contract was one entire contract, and not split into as many contracts as there were shipments. These subsidiary provisions related to time and mode of performance of the *entire* contract, and under *Bowers v. Shand*, such stipulations are of the essence of a mercantile contract. He held the buyers' acceptance of the February shipment to be no waiver, since done in ignorance that the stipulated quantity had not been shipped in that month, and finally, that the plaintiff, asserting the contract to be still in force, is bound to show such performance on his part as entitles him to demand it on theirs. Unfortunately, in an attempt to reconcile the English cases, a hopeless task, he distinguishes them upon a difference between a failure to deliver and to pay one installment. This is not necessary to the decision mere dictum, based upon what is, it is submitted, as before said, a mistaken view of Lord Selborne's dictum in *Mersey v. Naylor*.²

one who has partially performed, and is entitled on such partial performance to something from the other side, to sustain an action in advance of complete performance,—as where goods are sold to be delivered and paid for in parcels, to enable the seller to recover for the parcels delivered, in advance of completing his undertaking. But this equitable doctrine should not be invoked by one who has failed to perform, for the purpose of defeating the other's right to rescind, and thus to protect himself against the consequences of his own wrong. As against such a party the contract should be treated and enforced as entire. To say, therefore, that the contract is 'severable' does not, I repeat, advance the argument. To render the plaintiff's position logical, it is necessary to take a step forward, and hold that such a transaction (it would not be accurate in this view to call it a *contract*) constitutes *several distinct, independent* contracts. Then, of course, it follows that a failure as respects one of several successive deliveries affords no right to rescind in regard to those yet to be made."

¹ In *Mersey v. Naylor*, *supra*.

² Is not Lord Selborne's position this? Since each payment was subsequent to each delivery, the consideration for each delivery was the valid unbroken promise to pay for each the consideration for the whole, the valid unbroken promise to pay for all. So here the vendor has practically obtained his consideration; notwithstanding a technical breach of one promise to pay and a possible anticipatory technical breach of some at least of the future payments, the circumstances show

Therefore, it is not surprising to find in the case of *Cresswell v. Martindale*, 63 Fed. Rep. 86, a failure to accept and pay for a large part of one installment of cattle delivered in one month under such a contract for successive monthly deliveries, *held*—the Court citing and professing to follow *Norrington v. Wright*—to entitle the vendor to refuse to make any further deliveries under his contract. In this case also the default came not as to the first installment, but in a later portion after the contract had been in part executed on both sides.

These two cases then establish fully that while a perfect performance of one portion under the contract entitles the party to an equivalent compensation, a failure of a party to deliver or accept or pay for¹ one installment at any stage of

the vendee able, willing and ever anxious to perform his promise to pay. In other words, the circumstances show that the vendor has obtained substantially the agreed consideration, a valid promise not repudiated nor likely to be broken. Had the default been absolute, a failure to pay, all the vendor would obtain would be a right of action for damages for a broken promise, and not a promise still practically certain of substantial fulfillment, and so such a breach would destroy the consideration for the one and so render it impossible for the whole consideration ever to be received. This view overlooks the fact that the consideration for only the first installment is the promise to pay for it; the consideration for the others, judged by the rules in *Pordage v. Cole*, the promise to pay for it, and a proper orderly payment of the previous portions. An existing promise as to the future and a full performance as to the past.

¹ No distinction is made in the various state courts, except, perhaps, New Jersey, between a failure to deliver and a failure to pay for one installment. See *Robson v. Bohn*, 27 Minn. 333, and other cases cited in *Cresswell Co. v. Martindale*. It is, however, only in cases of exceptional circumstances like *Mersey v. Naylor* and *Freeth v. Burr* that the effect of a failure to pay or deliver can be different even in England, and that not from any difference in the rule of law, but because it is more easy to substantially perform a technically broken contract, notwithstanding the breach when the default is in payment and not in delivery. Such circumstances have not so far arisen in the American cases—if they did it is possible that rather than allow injustice to a party innocent of wrongful intent, the English rule, though unscientific, might be applied; this, however, is mere conjecture, and it is to be hoped that, in view of the confusion caused by these cases, the hardship of an innocent wrongdoer, if so he may be termed, will not be allowed to override the plain principles of commercial law.

the contract entitles the other to at once terminate the contract and refuse further performance thereof.

This right of rescission, or rather of treating a breach as terminating once for all a continuing contract, must be at once exercised; if the breach be waived as to the installment wherein it is committed, it can of course not be used as a reason for refusing performance of the residue of the contract; so, if a defective installment be accepted, and retained with knowledge of its imperfection, here, as in *Boone v. Eyre*, the only remedy for the breach is a cross-action for damages. Having accepted less, the agreed consideration is waived, and in lieu of perfect performance the party is taken to have agreed to accept the less and an action for damages. The default must be treated as a breach for all purposes or none.

Many cases¹ which are often cited as establishing that a failure as to one installment of a divisible contract will not justify a termination of the whole are but applications of this rule of waiver of breach. And it is owing to this very misconception that the Pennsylvania cases are so often quoted as opposed to *Hoare v. Rennie* and *Norrington v. Wright*.²

In *Reybold v. Voorhees*, 30 Pa. 116, the seller of an entire crop of peaches, to be paid for weekly as delivered, was held entitled to refuse to continue deliveries when a balance due at the end of a week was unpaid. Here it is to be noted the default was in payment, not in delivery, and the question is clearly and directly presented and determined according to *Hoare v. Rennie*.

The next case, *Forsyth v. Oil Co.*, 53 Pa. 168, is somewhat analogous to *Freeth v. Burr* and *Mersey v. Naylor*. The contract had been performed with great latitude on both sides, and the vendor meeting the secretary of the vendee company on the street, asked him for payment, which

¹ Such is the case of *Jonasohn v. Young*, 4 Bog. 296, decided soon after *Hoare v. Rennie*, and often cited as opposed to it, but really turning on the waiver of the breach by knowing acceptance and retention of imperfect performance.

² As in *Benjamin on Sales*.

was petulantly refused. The vendor then declared the contract at an end. That day everything due was paid. It was *held* that the refusal was more seeming than real,¹ and that since by mutual consent the contract had been construed liberally, neither party could avail himself of a refusal to perform it strictly as a breach without notifying the other that he intended to insist on a literal compliance with the terms. But the Court recognized that the right to terminate the contract would have existed but for the mutual agreement that a strict performance was not required.

A number of Pennsylvania cases are often considered as opposed to *Hoare v. Rennie* and *Reybold v. Voorhees*, and supporting *Simpson v. Crippin*.

The first is *Lucesco Oil Co. v. Brewer*, 66 Pa. 351. There was in that case no question raised as to the right of one party to refuse to continue to perform a contract already broken by the other. The only question was whether the contract was so far entire that a party who had advanced \$71,000 out of \$75,000 promised could not recover because of the failure to advance the whole, and to render certain accounts of oil sold. It was a case where, as in *Boone v. Eyre*, a party who had accepted and retained the substantial consideration of his contract is seeking to evade paying therefor by alleging that nothing was due till all was performed. It is this point and no other which the Court has in view when it decides that owing to the apportionment of the consideration the contract is severable and not entire, and that it is the character of the consideration and not the nature of the thing done which determines the contract to be either severable or entire. If the contract be apportioned or apportionable, it is severable if not entire. Whether this rule be a good or bad test² whereby to decide as to the

¹As in *Mersey v. Naylor*.

²It is submitted that the correct rule is that stated by Agnew, J., in *Shinn v. Bodine*, 60 Pa. 182: "The entirety of a contract depends on the intention of the party and not the divisibility of the subject; the severable nature of the latter may assist in determining the intention, but cannot overcome it when discovered." And in that case this rule was applied to a contract for the delivery of eight hundred tons of coal on board vessels sent by vendee during August and September, at so

severability, used in this sense, of a contract, it does not touch in any way the question under discussion.

Morgan v. McKee, 77 Pa. 229, is also often considered as supporting *Simpson v. Crippin*; however, their suit was brought upon three separate agreements, each for 500 barrels of oil. The defendants offered to prove that these three formed part of one entire contract for 4,000 barrels, which was only for convenience split into eight separate agreements, and that the plaintiffs had failed to deliver the fifth installment, which they alleged terminated their obligations as to the remaining three in suit. The Court properly refused the offer, for to so do would have been to vary the written agreements by parol, by showing each to be not itself a contract, but a mere dependent part of a greater contract; besides, the Court held that the defendants had not acted promptly upon the discovery, and that if they had ever had a right to rescind, they must be taken by their delay to have waived it, and to have elected to treat the contract as still existing.

This decision again does not touch the main question at all, but merely decides a point of evidence that where the parties have reduced their contracts to a written form, which on its face shows them to be not merely severable but separate and independent, evidence cannot be given to show they were something quite different; and, secondly, that by undue delay a party is taken to have waived his right to terminate the contract upon such a default.

So *Scott v. Kittanning Coal Co.*, 89 Pa. 231, also considered by *Benjamin* and others as supporting *Simpson v. Crippin*, will be found on inspection to turn upon the retention and use of the very coal the defective quality of which was the breach alleged as terminating the contract. The defendant could have refused the inferior coal, or if the defect was not immediately patent could have returned it when its defects were discovered. If it was retained and used

much a ton. The contract was held to be entire, notwithstanding the price being computed by the ton. There being no intent to sever the performance discoverable from the right to ship in two months the case was not brought within the rule of *Brandt v. Lawrence* (*supra*, Part I), and there was no right to payment in advance of deliveries of all.

it ceased to be a breach available to defeat recovery for the payment for that very delivery, and so of course could not be alleged as a ground for terminating the entire contract. By its acceptance and retention it had become a subject for action of damages. It could not be used to defeat any of the plaintiff's rights under the contract. All such effect had been waived by its acceptance and use.

And in *Rugg & Bogan v. Moore*, 110 Pa. 242, the last Pennsylvania case directly on the point, the defendant had sold by a parol contract six carloads of grain at a price per bushel. One car arrived, and the accompanying drafts were paid. The plaintiff refused to pay the drafts accompanying the second car until all the cars were received. The defendant then terminated the contract, and refused to deliver the remaining cars. The Supreme Court *held* that the severability of the contract was to be decided by the jury by an application of the rule in *Lucesco v. Brewer, supra*. That under the evidence they could not have consistently found it entire, as there was a strong inference that the payment for each car became due upon delivery, so long as the contract remained unbroken, and the vendee had no right to withhold payment till all was delivered; and if the jury had so found, a failure to pay for any one carload without sufficient reason justified the vendor in rescinding his contract, and if the right was exercised promptly the contract was at an end. It was said that it was only where, as in *Morgan v. McKee*, "the contract consisted of severable distinct and independent parts, each of which could be performed without reference to the other, that a failure to perform one part does not authorize the termination of the contract, and after distinguishing *Scott v. Kittanning Coal Co.* as indicated *supra*, *Reybold v. Voorhees* is quoted as decisive.

This case decides that the term "severable" is understood by that Court, as it is by Judge Butler,¹ not as indicating a group of separate contracts, but a contract where each part is dependent upon the other, until by performance severed from it, differing from an unseverable entire contract only in this: that a strict orderly performance of a part shall en-

¹ In his opinion in *Norrington v. Wright*.

title the party to compensation in advance of a tender of the whole, since such is the intention of the parties as gathered from the terms of the contract, and it is this intention which must be discovered by the Court, or jury if the contract be by parol, and which, when discovered, must govern. It is well also to note that here the default was not in a failure to deliver, but in a failure to pay for one installment, and that a part had been fully performed on both sides. This did not affect the right to terminate all that remained executory upon the happening of the breach.¹

These Pennsylvania cases also show clearly how the right to terminate a contract upon such a breach may be lost: (1) by prior acquiescence in a loose inexact performance.² To then treat a failure to comply with the strict literal stipulations of the contract would be to allow one party to entrap another into a default so as to escape his own obligations. (2) By delay. The right must be asserted immediately after breach, or will be taken to be waived.³

(3) By the acceptance and retention of the imperfect performance of one installment, the defect in which is the breach alleged.⁴ The default must be treated as a breach for all purposes or none. It may be waived once for all, or not at all. If a defective performance be accepted it can never be treated as freeing the party accepting from any of his obligations in regard to that installment, or for the future: the default must be remedied by damages.⁵

In New York the case of *Pope v. Porter*, 102 N. Y. 366, held that a failure to deliver one installment gave the vendee the right to terminate the whole contract.⁶ The term divisible was held properly applicable to contracts wherein a part performance on the one side must be compensated by a corresponding part performance of the other in advance of any possibility of knowing whether the whole will ever be

¹ Though, of course, the breach did not affect the rights already vested by the perfect prior part performance.

² *Forsyth v. Oil Co.*, 53 Pa. 161.

³ *Morgan v. McKee*, 77 Pa. 229.

⁴ *Scott v. Kittanning*, 89 Pa. 231.

⁵ As in *Boone v. Eyre*, *supra*, Part I.

The opinion of Finch, J., is well worth attentive study.

tendered. But this does not mean that a party must accept a part performance in inverse order of his contract, but according to its terms.¹ The breach in *Pope v. Porter* was a failure to deliver, but no weight is attached to this fact, and in *Clarke v. Garder*, 21 N. Y. 339, the same effect is given to a failure to pay for one installment.

The case of *Stephenson v. Cady*, 117 Mass. 6, often quoted upon both sides, is both exceptional in its facts, and is of little authority beyond them in either.

There were three separate contracts, the only connection being that the deliveries of the second were to begin when those of the first were complete. The vendee refused to pay a draft for certain goods delivered under the first contract, unless security was given for the fulfillment of all the contracts; and this was *held* to be broad enough to be treated as a general refusal to make any further payments, and so a breach by anticipation of the whole of the contracts, citing *Withers v. Reynolds*, 2 B. & Ad. 882, and *Bloomer v. Bernstein*, L. R., 9 C. P. 588.² Here there was not one contract with stipulations as to severance of performance, but three separate contracts without anything to show them to be anything other than they appeared, independent of each other, except that if the delivery of all under the first contract were excused by a breach thereof, there could be no obligation to deliver anything under the second. Still the connection is but slight, and the case of the nature of *Morgan v. McKee* (77 Pa. 229, *supra*) rather than *Hoare v. Rennie*, and a proper subject for the doctrine of breach by anticipation. Besides, the Court does not say a bare refusal to pay would not have been sufficient to justify a rescission of the first contract or of all. It says it is more than a bare refusal; it relates also to all future payments.

¹The cases of *Tipton v. Feitner*, 20 N. Y. 423; *Sickell v. Pattison*, 14 Wendell, 257; *Swift v. Opdyke*, 43 Barbour 274, *Per Lee v. Beebe*, 13 Hun. 89, are all instances of this effect of a severance of performance in a state where, if a contract is entire, the rule that all must be tendered before anything is due has been very stoutly applied. *Catlin v. Tobias*, 26 N. Y. 217.

²See Part I.

It would be irksome to cite instances in every jurisdiction. Suffice it to say that with few exceptions throughout the States of the Union, it is now settled law that a contract where the thing sold is to be delivered in installments and corresponding payments made, an orderly part performance gives the right to a proportionate payment without regard to any future performance or breach of the residue. But if either party be guilty of a breach either in delivery or payment, either as to the first or any subsequent portion, then the other party at his option may terminate all of the contract which is still executory, though such termination does not affect the rights already vested by an orderly part performance.

In New Jersey¹ and Iowa² Lord Blackburn's view in *Mersey v. Naylor* seems to be followed. The severance of performance makes the contract not merely divisible, but so far separate and independent that a breach as to one can only affect those subsequently to be performed when the circumstances surrounding show it to amount to a breach by anticipation as to them.

Francis H. Bohlen.

¹ Gerli v. Poidebard, 57 N. J. Law 432.

² Wheeler v. Myer, 65 Iowa, 390.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

ARBITRATION.

In *Munson v. Straits of Dover S. S. Co.* 99 Fed. 789, a suit in admiralty, the question arose under a charter which provided generally for submission to arbitration. **Damages for** One of the parties, disregarding this provision, **Refusal to** brought a libel against the other, which the court **Arbitrate** dismissed without costs. The defendant then filed this libel against the plaintiff for breach of the agreement to arbitrate, averring as his basis for damages the fact that his expenses for counsel, etc., in the former suit were greater than those he would have incurred had the matter been submitted to arbitration. Judge Brown of the District Court (S. D. N. Y.) dismissed the libel, holding that no adequate damages had been proven, and it was clear that a libel in admiralty would not lie for the recovery of nominal damages. The opinion covers all the authorities on the subject, after an examination of which Judge Brown remarks that there is no reported case where a recovery has been allowed for breach of a merely executory agreement to arbitrate.

BANKRUPTCY.

"A court of bankruptcy ought to be as honest as other people." This expression, taken from the opinion in *Ex Parte James*, 9 Ch. App. 609, was made by Judge Baker of the District Court (D. Md.) the basis of his decision that a trustee in bankruptcy may not take advantage of the well-known rule of law that a voluntary payment, made in ignorance of law, cannot be recovered back. In *In Re Myers*, 99 Fed. 691, the bankrupt had a deposit of \$777 in a bank, which transferred the same to the credit of the trustee in bankruptcy and proved its claim against the estate on a \$5,000 note of the bankrupt, held by it. Subsequently the bank found out that it would have had the right to retain the deposit as a set-off against the note; it therefore presented a petition praying for leave to withhold the \$777 for its own benefit, and to file a new proof of claim for \$4,223.

BANKRUPTCY (Continued).

Held, that the petition should be granted, since the case should be governed by equity and not by the above-mentioned rule of law.

BILLS AND NOTES.

Morrison v. Bank, 60 Pac. (Okla.) 273, affirms the rule, prevailing in some jurisdictions, that the mere receipt of a note by a bank, which thereupon credits the depositor with the amount of the note, does not *ipso facto* render the bank a holder for value. To become so, the bank must actually part with something in return for the note, *i. e.*, the depositor must either draw or check out the amount.

Courts now give a reasonable interpretation to the rule that the amount of a promissory note must be certain and capable of being ascertained at any time. Formerly the addition of the words, "payable with exchange," was held to destroy the negotiability of a note, but nowadays the great weight of authority is to the contrary: *Clark v. Skeen*, 60 Pac. 325.

CHAMPERTY.

In Utah, as in most other states, an agreement with an attorney for a contingent fee is valid and binding upon both parties, but the courts have drawn the line where such agreements contemplate an undertaking on the part of the attorney to supply the costs of the suit. In *Nelson v. Evans*, 60 Pac. 557, the attorney agreed to pay all costs, taxable or otherwise, including the cost of procuring witnesses. The client paid the costs of suit and sued the attorney for their recovery. The Supreme Court of Utah decided that this provision in the agreement was champertous and unenforceable.

A statute of Colorado (Gen. Stat. § 815) prohibits any person from "officially intermeddling" with a suit of another. In *Casserleigh v. Wood*, 59 Pac. 1024, the validity of a contract was in question whereby one party agreed to procure and supply evidence for an action which the other was about to bring, the consideration being a contingent fee based upon the recovery. The Court of Appeals of Colorado, in an exhaustive opinion by Wilson, J., decided that the strict English rules against champerty and maintenance do not prevail generally in this country, and that the above agreement was not contrary to public policy.

CONFLICT OF LAWS.

While it is generally true that the application of the statute of limitations is governed by the law of the forum, to the exclusion of the law of the place where the action arises, yet a well-recognized exception exists where the cause of action is based entirely upon a foreign statute. Thus in *Brunswick Co. v. Bank*, 99 Fed. 635, an action was brought in Maryland to enforce the individual liability of a stockholder in a Georgia corporation under a Georgia statute. The Circuit Court of Appeals (4th Circ.) decided that the Georgia statute of limitations relating to stockholders' liability, and not the Maryland statute of limitations, applied. Brawley, J., dissented.

Statute of
Limitations,
Stockholder's
Liability.

CONSTITUTIONAL LAW.

Following the leading case of *Rwy. Co. v. Smith*, 173 U. S. 684, the Court of Appeals in *Beardsley v. N. Y., etc., Rwy. Co.*, 56 N. E. 488, decided that the New York act of 1895 (C. 1027), requiring all railroads in New York to issue 1000-mile ticket books for \$20, was, as applied to railroads incorporated previous to 1895, void as depriving them of property without due process of law. But the act is valid as to railroads subsequently incorporated, since they receive their charters on the express condition that they will obey its provisions: *Purdy v. Erie Rwy. Co.*, 56 N. E. 509.

Statute
Requiring
Issue of
1000-Mile
Ticket Books

The Supreme Court of Kansas, in *Atchison, etc., Rwy. Co. v. Campbell*, 59 Pac. 1051, has declared unconstitutional, as being in conflict with the fourteenth amendment to the Constitution of the United States, a statute of Kansas (1895, C. 195) requiring railroad companies within that state to allow every shipper of cattle, or one of his employes, to travel free of charge with each shipment of cattle. The statute was held to be without the police power, since it did not sufficiently appear to the court that the mere fact that the shipper traveled with the cattle, which were completely under the control of the railroad company, would contribute at all to the safety of the cattle or to the general public welfare. In his opinion, Doster, C. J., says that he does not believe that the word "person" in the fourteenth amendment was intended to refer to corporations, but he yields gracefully to the authority of the Supreme Court of the United States.

Issue of
Drivers'
Passes

CONTRACTS.

In *Brewer v. Horst-Lachmund Co.*, 60 Pac. 418, the Supreme Court of California held that an offer and acceptance by telegram were memoranda sufficient to take the transaction out of the statute of frauds.

Telegrams

CORPORATIONS.

The rule which protects members of an association which has been irregularly incorporated requires that the person seeking to hold them as partners shall have dealt with them as a corporation; in other words, the basis of the rule is the implied agreement between the parties that the contract shall be made with the corporation alone and that recourse shall be had only against the treasury of the corporation. This view is supported by *Slocum v. Head et al.*, 81 N. W. 673, where the Supreme Court of Wisconsin decided that evidence was admissible on behalf of the plaintiff, to show that at the time he dealt with the irregularly incorporated association he was informed that he was dealing with a partnership and that he intended to treat the defendants as partners.

Irregular
Incorporation,
Liability

CRIMINAL LAW.

An indictment for bigamy averred that the defendant, A. P. Niece, while his wife, Anna L. Niece, was living and undivorced, married one N. J. Overman. *Held*, that the indictment was insufficient, since it did not contain an allegation that N. J. Overman was not the wife of the defendant at the time of his second marriage; and the mere fact that the name N. J. Overman was different from that of A. P. Niece and Anna L. Niece was insufficient, in strict criminal law, to enable the court to infer that N. J. Overman and Anna L. Niece were different persons: *Niece v. Territory*, 60 Pac. (Okla.) 300.

Bigamy,
Indictment

EVIDENCE.

In *Archer v. United States*, 60 Pac. 268, a case involving a question of disputed handwriting, the plaintiff endeavored to prove that a certain document was written by the defendant. The plaintiff produced an affidavit, the signature to which was declared by experts, basing their opinion upon comparisons with the defendant's handwriting, to have been the defendant's. The plaintiff was then allowed to submit the signature to the affidavit as a test paper to experts, who compared it with the

Disputed
Handwriting,
Test Paper,
Identification

EVIDENCE (Continued).

document in question and declared the handwriting to be the same. Upon appeal, the action of the trial court was held in error by the Supreme Court of Oklahoma, upon the ground, intimated, though not decided, in *Travis v. Brown*, 43 Pa. 9, that the identification of a document as a test paper must be established by evidence other than mere comparison. "To say that the standard writing may be established by comparison with some other standard is to base a probability upon a probability, and if this may be done in the first instance it may be followed by proving successive standards by comparison with other standards resting solely on opinion evidence, until the real question to be established is lost in confusion." Per Burford, C. J.

In a divorce suit before the Superior Court of Delaware a United States letter carrier was called to the stand, and asked questions in regard to the action of one of the parties in directing him to deliver letters to another person and at another house, etc. Objection was made that there was a United States postal regulation forbidding letter carriers to disclose information of this character; therefore such information was privileged, as being received by a government officer in his official capacity. *Held*, that the questions should be answered: *Smith v. Smith*, 45 Atl. 848.

Hankinson v. Lynn Electric Co., 56 N. E. 604, presents a very interesting question. Is the testimony of a person as to his motive upon a particular occasion conclusive, in the absence of evidence to the contrary? This was an action against an electric company for injuries received from a piece of carbon thrown down upon the street by one of the defendants' linemen. The lineman testified positively that he threw down the carbon for a private purpose of his own: "I threw the carbon at the team to attract his [the plaintiff's] attention, so that I might speak to him, and not for any business of the company." Of course there was no other direct evidence on the question of motive, and the defendant insisted that the above evidence was conclusive proof that the lineman was not acting within the scope of his employment. The trial judge, however, left the question to the jury, and a verdict for the plaintiff was approved by the Supreme Court of Massachusetts, chiefly on the ground that the lineman was in the employ of the defendant; therefore, his testimony, although uncontradicted, was open to suspicion.

**Testimony by
Letter Carrier**

**Testimony as
to Purpose of
Act, Conclu-
siveness**

INFANCY.

Merchants, enraged at the plea of infancy being set up to preclude recovery for goods sold, where the transactions have appeared regular, have often endeavored to hold the infant in tort for conversion. Thus in *Slayton v. Barry*, 56 N. E. 575, the infant had represented himself to be of full age, whereupon the plaintiff sued him in trover, alleging that no title passed, by reason of the fraud in the transaction. Adopting the general rule, in opposition to the one in force in New Hampshire and a few other states, the Supreme Court of Massachusetts decided that since the fraud was inseparably connected with the contract, the plaintiff's claim for recovery would have to be based on the contract, and that he could not evade the law of infancy by sounding his action in tort. Judgment for the defendant was therefore affirmed.

INSURANCE.

Some early cases held that no person could take out valid insurance unless he had an interest in the property insured when the policy was taken out. However, in *Sun Insurance Office v. Merz*, 45 Atl. 785, the Court of Appeals of New Jersey showed that this rule has been abrogated, and at the present day the only test is whether or not the insured has an insurable interest at the time of the loss.

A stipulation in a policy of fire insurance that no officer or agent of the company shall have power to waive any of the conditions of the policy applies only to those conditions and provisions in the policy which relate to the formation and continuance of the contract of insurance, and are essential to the binding force of the contract while it is running, and does not apply to those conditions which are to be performed after loss has occurred, in order to enable the insured to sue on his contract, such as giving notice and furnishing preliminary proofs: *Washburn Co. v. Merchants' United Fire Insurance Co.*, 81 N. W. (Iowa) 707.

LIMITATION OF ACTIONS.

In *Wells Co. v. Enright*, 60 Pac. 439, it was contended that an agreement not to plead the statute of limitations was void

LIMITATION OF ACTIONS (Continued).

Agreement not to Plead Statute as against public policy. The Supreme Court of California held that as the statute was not based on any peculiar principle of morality or public policy, but was intended merely for the protection of the debtor, the latter had a perfect right to waive the benefit of such protection whenever he should think proper.

Running of Statute in Favor of Insolvent Corporation When a debtor makes an assignment for the benefit of creditors, it is well settled that if a debt is not barred by the statute of limitations at the date of the assignment, the statute will not run as against the assigned estate as long as the property is in the hands of the assignee. Does the same rule apply to the case of a corporation debtor which has become insolvent and has gone into the hands of a receiver? In *McDonald v. State of Nebraska*, 101 Fed. 171, Caldwell, J., of the Circuit Court of Appeals (8th Circ.) was strongly of the opinion that the rule applied to claims against the receiver of an insolvent national bank; but the question was not directly before the court, since the action had been brought by the treasurer of the State of Nebraska, in his official capacity, while the debt was yet alive, and it was held that the substitution of the State of Nebraska as plaintiff was not a change of the cause of action that would not relate back to the beginning of the action, as far as the statute of limitation was concerned.

MASTER AND SERVANT.

Under the decisions of the Supreme Court of Tennessee a telegraph operator on a railroad is not a fellow servant of an engineer, so as to preclude recovery by the latter for the negligence of the former: *R. R. v. De Armond*, 86 Tenn. 75. In such a case, even though the cause of action arises in Tennessee, the Federal Courts will disregard the state decisions and apply their own rule that the fellow servant doctrine applies: *Ill. Cent. R. R. v. Bentz*, 99 Fed. (Circ. Ct. of App., 6th Circ.), 657.

MORTGAGES.

Where a person lends money to a mortgagor for the express purpose of paying off the mortgage, and the money is so used and the mortgage satisfied, and the lender takes another mortgage on the property without securing an assignment of the first mortgage, the lender is subrogated to the rights of the former mortgagee as against one who has an interest in the property subsequent to

MORTGAGES (Continued).

the satisfaction of the first mortgage, of which interest the lender has no notice: *Rachal v. Smith*, 101 Fed. (Circ. Ct. of App., 5th Circ.), 159.

PRINCIPAL AND AGENT.

In *Capital Co. v. Paper Co.*, 57 Pac., 504, the Supreme Court of Kansas decided that there was no such officer of a corporation as a "business manager" known to the law; therefore in an action on a note of the corporation signed by a person as "business manager" an averment was necessary that the business manager had authority delegated to him to make the note. However, upon a rehearing of the case (59 Pac. 1062), an averment in the complaint that the said corporation "made, executed and delivered" the note was held to sufficiently imply an averment that the business manager possessed the requisite authority.

REAL PROPERTY.

The rule that requires actual possession to render a parol contract for the sale of land enforceable is not absolute, but may be relaxed in some cases. Thus in *Bryson v. McShane*, 35 S. E. 848, the decedent, the owner of several pieces of land in different localities, promised the plaintiff that if the latter would nurse and support her for the rest of her life she would deed her [the plaintiff] all her property. The plaintiff lived with the decedent and performed her part of the agreement, but before the deeds were drawn the decedent died. The heirs of the decedent objected to the enforcement of the parol contract in regard to all the land except that on which the decedent actually lived, on the ground that the plaintiff did not take possession. The Court of Appeals of West Virginia decided that the plaintiff had taken the requisite possession under the contract and that an actual entry on all the tracts was not necessary. This relaxation of the general rule is not permitted in some jurisdictions: *Austin v. Davis*, 128 Ind. 472.

STATUTES.

Some difficulty arises where a statute prescribes that a certain result shall follow an acknowledgment in writing. Must the acknowledgment be made for the express purpose of effecting the result or not? The code of Washington (§ 4624) provides that an illegitimate child shall be the heir of its

Acknowledg-
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STATUTES (Continued).

father, when the latter acknowledges in writing that he is the father. In *Rohrer v. Muller*, 60 Pac. 122, the Supreme Court of Washington decided that a writing was sufficient which was not executed for the purpose of complying with the statute, but as an affidavit to a complaint in a suit which the father was bringing for the seduction of the child.

WAREHOUSEMEN.

The Pennsylvania act of September 24, 1866 (P. L. [1867] 1363), which provides in substance that the holder of a warehouse receipt shall be deemed to be the owner of the goods represented thereby, being in derogation of the common law, should receive a strict construction. Thus in *Moors v. Jagode*, 45 Atl. 723, the Supreme Court of Pennsylvania decided that where a member of a mercantile firm institutes a so-called "warehouse," which is practically controlled by the firm and used by the latter alone, the firm may not place its own goods in the warehouse and receive a warehouse receipt therefor; and even a *bona-fide* holder of such a receipt will not be protected as against a purchaser of the goods from the firm.

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DISQUALIFICATION OF JUDGE BY INTEREST—AFFINITY. *State v. Wall*, 26 So. R. Fla. 1020, (1900). The Supreme Court of Florida has just decided that a man is related by affinity to the husband of his wife's niece. There is a statute in force in that state providing that no person shall sit as judge in any case where he is related to either of the parties whether by consanguinity or affinity. In the present case, the judge, being the husband of the complainant's wife's aunt, had refused to preside at the trial. This was an action to compel him to do so. The Supreme Court sustained him in his refusal.

In Anderson's Dictionary of Law, "affinity" is defined as "the connection which arises from marriage between the husband and the blood-relatives of the wife, and between the wife and the blood-relatives of the husband." It would appear that there was no affinity between the judge and the complainant. There is no blood-relationship between his wife and the niece's husband—there is no com-

mon ancestor from whom they can trace their descent. The Florida Court gets around this difficulty by taking it that husband and wife are one, in law, and since she is related by affinity to the niece's husband, he is also. See *Kelly v. Neely*, 12 Ark. 657, (1852).

There is a dictum of Chancellor Walworth in the case of *Paddock v. Wells*, 2 Barb. (Chancery) 331, (1847), in which he states that relationship by affinity may also exist between the husband and one who is connected by marriage with a blood-relative of the wife. He gives as an example the marriage of two strangers to sisters, and states that they are related in the second degree of affinity just as the sisters are in the second degree of consanguinity.

His statements, however, were entirely unnecessary, as the party in question was the first cousin of a former husband of the defendant, issue of which marriage were still surviving.

There was likewise clearly affinity in the other New York case of *R. R. v. Schuyler*, 28 How. Pr. 187, (1855).

It may be safely said that the question is an open one in the majority of the states. It is well settled that a man's brother is not related by affinity to those to whom he is so related: *Rank v. Shewey*, 4 Watts 218, (1835); *Chase v. Jennings*, 38 Me. 44, (1854); *Bigelow v. Sprague*, 140 Mass. 425, (1886). In these states the question in the present case has not been raised.

Some authorities consider that these cases show a tendency to oppose the Florida doctrine if the case should arise. But there seems to be nothing to lead to this conclusion. If these cases had been tried in Florida, the same decision would have been rendered.

There are, however, many cases which flatly contradict the present decision. *Hume v. Bank*, 10 Lea (Tenn.) 1, (1882), following *Moses v. State*, 11 Humph. 232, (1850), holds that it is impossible to apply the rule contended for that husband and wife are to such an extent one as to make her relations by affinity his. If there is any such rule, the wife's existence is merged in that of the husband, which would defeat the contention that the husband stands in the place of the wife: *O'Neal v. State*, 47 Ga. 229, (1872).

The case of *Chinn v. State*, 47 Ohio St. 575, (1890), is in direct conflict with Chancellor Walworth's dictum, above referred to. There it was held that a man and his wife's brother's wife were not related by affinity. Likewise Christian, in his note to I Blackstone, 435, declared that even where by the law it is unlawful to marry one related by affinity, a man may marry his wife's brother's wife, the circumstances permitting.

Possibly the most recent case holding the view opposite to *State v. Wall* is *Tegarden v. Phillips*, 42 N. E. (Ind.) 549, (1895), which is exactly parallel to the present case. In this case the judge admits that a line of affinity extends from the husband to the wife's blood and *vice versa*; but he denies that new blood can be introduced by the marriage of the affinity relatives of either.

The great question seems to be, are husband and wife one person, or are they for the present purposes united by the strongest kind of an affinity, which would, however, prevent any relationship between the husband and the wife's affinity relatives.

However, which is the better rule on grounds of public policy? The doctrine, of course, was established to prevent interested parties from acting as judges; and, to this end, some fixed rule had to be adopted. Unsatisfactory it was of necessity. Frequently the greatest temptation to partiality occurs in the trial of an intimate friend who falls within no prohibitory clause, on the ground of relationship. The family spirit of to-day is hardly the same powerful influence that it was a century ago, and while not to be disregarded, should warrant a restrictive and not a broad construction of such a statute as the present. It may be that there is as much inclination to favor your wife's niece's husband as to favor your wife's nephew, but there must be a line of demarcation somewhere.

PROMISSORY NOTES—CONTRACT OF INDORSER—PAROL EVIDENCE TO VARY. *Northern National Bank v. Hoopes*, 98 Fed. 935, (1900). This case was decided in the Circuit Court, having come up in the Eastern District of Pennsylvania. The decision was rendered by Judge Dallas. It is of importance because of throwing light on the vexed question—in Pennsylvania, at least—of the admission of parol evidence to vary the contract of an indorser on a promissory note.

The defendant in the case under consideration alleged that an express oral agreement, made at the time the note was indorsed, was to the effect that if the maker was not satisfied with the work to be done by the promisee in consideration of the note, the note was to remain unpaid. To quote from the opinion: "The oral agreement alleged is in direct contradiction of the absolute obligation incurred by the defendant's indorsement of the note sued on, and it cannot be received to annex a condition to that obligation."

The question of the place of contract was not germane, for the case dealt not with local, but general commercial law. *Swift v. Tyson*, 16 Pet. 1, (1842), and subsequent cases are cited to confirm this point.

"In Pennsylvania, it is true, it has been decided that the contract evidenced by the blank indorsement of a promissory note is not subject to the rule which excludes oral evidence to alter or vary the terms of a written agreement: *Ross v. Espy*, 66 Pa. 482, (1870). But the distinction upon which this decision was based seems to me to be unwarranted. The contract of indorsement is not an 'implied' one. An implied contract, in the legal sense of the term, is one which has no existence in fact, but which the law for the furtherance of justice imposes upon a party, who, under the circumstances of the case, ought to be held as if he had contracted, though in truth he never contracted at all. It is founded upon legal obligation, but is actually non-existent, whereas the contract of indorsement is a veritable one, in which the element of consent is always present. 'It is an express contract, and is in writing, some of the terms of which, according to the custom of merchants, and for the convenience of commerce, are usually omitted, but not the less on

that account perfectly understood. All its terms are certain, fixed and definite, and when necessary, supplied by that common knowledge, based on universal custom which has made it both safe and convenient to rest the rights and obligations of parties to such instruments upon an abbreviation, so that the mere name of the indorser, signed upon the back of a negotiable instrument, conveys and expresses his meaning and intention as fully and completely as if he had written out the customary obligation of his contract in full: " *Martin v. Cole*, 104 U. S. 37, (1881).

The cases on this point are numerous and the question well nigh settled. See *Chaddock v. Vanness*, 35 N. J. Law, 517, (1871); *Bank v. Dunn*, 6 Pet. (U. S.) 51, (1832); *Bast v. Bank*, 101 U. S. 93, (1879).

Indeed, even in Pennsylvania, *Phillips v. Meily*, 106 Pa. 536, (1884), seems to throw much doubt upon, if not to directly overrule, *Ross v. Eppy*. It is to be hoped that decisions like the one under consideration will do much to settle the doubt in Pennsylvania, where to-day the question is still in dispute.

BOOK REVIEWS.

CASES ON CONSTITUTIONAL LAW, by EMLIN MCCLAIN, A. M., LL. D. Boston: Little, Brown & Co., 1900.

This collection of cases, compiled by the Chancellor of the Law Department of the State University of Iowa, will, we believe, meet with a warm welcome. We are only surprised that such a book has not appeared before this. The work is based upon the universally popular book of the late Judge Cooley—the “Principles of Constitutional Law”—and follows the arrangement of that book strictly, with the exception of the first couple of chapters therein, which are too general and partake too much of a historical character to admit of illustration by the case system.

It is true that there are case books on Constitutional Law which contain the great majority of the cases included in Dr. McClain's work; but the arrangement is so different from Judge Cooley's that there cannot fail to be confusion. For example, in the usual arrangement, the case of *Gelpche v. Dubuque*, 1 Wall. 175, is placed under the head of the IMPAIRMENT of the OBLIGATION of CONTRACTS; but in this work, following the idea of Judge Cooley, it comes under the head of “Following the Law of the State.”

It is to be hoped that this volume may induce many institutions which have hitherto used only the text-book to adopt to a greater extent the case system. Indeed, in many colleges where CONSTITUTIONAL LAW is taken up, there are no reports accessible; but with this volume the difficulty is removed, and greater interest is added to the course.

The work consists of only one volume. This brevity has been attained without the loss of completeness by omitting such cases as are thoroughly discussed in other cases contained in the book. They are, however, noted in the index. We think that by this method one of the great objections to courses on this subject has been removed, namely, the endless repetition involved in reading all the leading cases.

E. W. K.

THE LAW OF EXPERT AND OPINION EVIDENCE. By JOHN D. LAWSON, LL. D. Chicago: T. H. Flood & Co. 1900.

That the law of evidence is one of the most important branches of legal study may easily be ascertained by a glance at reported cases. In looking over the state or federal reports we see that a large majority of appeals are brought up on matters of the admission or exclusion of evidence, and all the nonsuits, of course, depend for their existence mainly on grounds of evidence. Remembering this, we are not surprised to find a large volume devoted to “The

Law of Expert and Opinion Evidence," which is to-day the most important sub-head of the law of evidence itself. Following the example of Stephen, the author has arranged the subject by rules; but the work is by no means a digest, for the rules are explained and many cases and citations added to each and every one of them. The work before us is the second edition, a noteworthy feature of which is the number of recent cases in which the rules laid down here were followed, a gratifying tribute to the excellence of the volume and the labor of the author.

We note with regret that the case of *Travis v. Brown*, 43 Pa. 12, (1862), is cited as the Pennsylvania law on the subject of comparison by witnesses. The Act of Assembly of May 15, 1895, P. L. 69, allows experts to make comparison of handwritings, overruling *Travis v. Brown*. Aside from this, the only error we have seen in this work of over 600 pages, the work commends itself to every practitioner because of its practical utility.

J. M. D.

STUDIES IN INTERNATIONAL LAW. By E. STOCQUART, D. C. L. Brussels: Veuve Ferdinand Larcier. 1900.

To the student of law comparative jurisprudence is always of peculiar interest. Any contribution to that subject is, therefore, to be especially welcomed. There has just appeared a pamphlet of seventy pages, entitled "Studies in Private International Law," which is both interesting to the theoretical and valuable to the practicing lawyer. Dr. Stocquart, who has written much on kindred topics, presents to our consideration three essays. The first on "Domicile" is very short—too short in fact, since clearness has, in a measure, been sacrificed to brevity. It is to be hoped that at some future time Dr. Stocquart will amplify his ideas on this subject. He does, however, make clear the difference between the American and English point of view in reference to personal capacity, as affected by domicile and the point of view held in Civil Law countries, to wit, France, Belgium, Italy, Spain and Germany. The difference is this: that generally speaking, in the latter countries, a person's civil rights and the legal effects of his conduct, are determined by citizenship or allegiance, while under the Common Law the law of the domicile of the person whose rights or conduct is in question, determines that question. A single example will make this clear. "D., an American citizen, and M., a Spanish lady, age 19, without her father's due consent [absolutely necessary in Spain until 20 years of age in females, and 23 in males], are legally married in the United States. The marriage nevertheless is null in Spain, where M., on her return, will be liable to an imprisonment for a period not less than six months and a day, and not exceeding six years."¹

Bearing this fundamental distinction in mind we are better pre-

¹ "Studies," p. 28.

pared to understand the second essay on "Marriage," which forms the *pièce de resistance* of the pamphlet.

Our author points out the two legal ways of viewing marriage; that is, either as a sacrament and consequently indissoluble, or as a contract simply, to be broken on occasion in conformity with the rules of positive law. He shows how one or the other of these views has prevailed at all times in Europe, according to the predominance of the church or commonwealth in the various nations. At the present day the latter view prevails in France, Belgium, Holland, Italy, Germany, Hungary, Switzerland and in Austria also, but not, it seems, to its full extent. Only Spain clings to the canon law as enunciated by the Council of Trent, although civil marriages were legalized during the existence in power of the Liberal party from 1870-75. After that time Roman Catholics could only be married according to the rites of the Church of Rome. Civil marriage was, however, preserved for the benefit of those outside that sect. Since this law applies also to the Philippines we can readily understand the state of concubinage so prevalent in that group of islands. The natives being all Roman Catholics could be legally married only by a priest. Being too poor to pay the required fee, usually exorbitant, considering their means, they could not be married at all. The folly of such a policy is self-evident.

Dr. Stocquart treats at length the laws of marriage in the countries above mentioned, and this essay will be found to be of much practical value in case of foreign successions. We cite one case which is fundamental and—we take it—law in all the countries under the Civil Law. "D., . . . a French domiciled citizen, in order to evade the opposition of his father, goes to Italy and marries an Italian woman without publication in France of banns required by . . . [the] Code Napoleon. The Italian Code leaves it to the French law to decide whether such a marriage is valid or invalid."¹

The third and concluding essay is on the subject of "Divorce in France and Germany."

Passing by our author's discussion of the vexed question of jurisdiction of the French courts in cases of divorce between foreigners, we come to the ever recurring principle in the Civil Law that the laws of a man's nation pursue him everywhere. Dr. Stocquart says on this point, "The *right of* and *causes for* divorce of a foreigner residing in France are ruled by the laws of his own country, and not by the laws of his actual domicile." Farther on we note this statement: "The American doctrine appears to be the following: Jurisdiction to grant divorces is, in all cases, statutory, and no court, though having jurisdiction, can grant the decree of divorce, except for causes provided by the statute under which they act." This is inaccurate as in some states, certainly the Common Law rules as to divorce still exist.

Turning to the German Law under the new Code, we find that divorce can be had only by judgment of a court and for "causes

¹ "Studies," p. 38.

specified by law."¹ This statement is ambiguous; whether it means that legislative divorces are not valid or that the *lex patriæ* is not to be regarded is uncertain. Probably in view of the supremacy of the legislature in Germany over the courts the latter is meant.

Altogether Dr. Stocquart's pamphlet is interesting and valuable. In spite of the fact that he is writing in a foreign language which differs in idiom so much from his own (presumably French) there are very few *gaucheries* of expression and only one or two real errors which may fairly be attributed to the Belgian printer. It is to be hoped that our author will at some time expand these essays, as the first and third of them are mere skeletons, a fact due no doubt to the "constant pressure of professional duties" of which he speaks in his preface.

E. B. S., Jr.

¹ "Studies," p. 69.

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No. 9.

THE REVIVAL OF A PRIOR BY THE REVOCATION OF A LATER WILL.

The Statute of Frauds was, at the time of its passage, evidently thought by English lawmakers to be a complete and final disposition of all questions relative to the legal modes and forms for the expression of a man's testamentary intent. Experience has, however, proved that there are numerous instances which the statute does not explicitly cover. The consequence has been the growth of an enormous body of law dealing with the question whether a testator has succeeded legally in doing what he intended to do,—that is to say, whether his testamentary intent can be considered, in view of the condition or form in which he has left the evidence of such intent. Most of the uncertainties and omissions in the Statute of Frauds have been cured in England by the Wills Act of 1st Victoria, C. 26, which has greatly simplified the law of wills and done much to reduce it to a clear and uniform code both as to realty and personality.

One of the cases not dealt with by the Statute of Frauds is that which arises where two or more wills exist, the later

revoking the earlier, and the later is itself revoked. The statute is silent as to the result of such revocation upon former wills. Its framers were careful to provide how a will might be revoked, but failed to provide any method for the revocation of a revocation. This was probably due to the fact that it was considered that a revocation of a revocation was itself really a new testamentary act. If it had been so considered from the first, all difficulty would have been removed. As it is, however, the question of revival of an earlier will by the destruction or other revocation of a later will is involved in much contradiction and conflict. The courts of different jurisdictions seem to have taken every conceivable view of the matter, and it can hardly be said that there is any doctrine which carries with it the decided weight of authority.

The matter has been settled in England by the statute of 1st Victoria, C. 26, Sec. 22 (1837), which provides "that no will or codicil, or any part thereof, which shall be in any way revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same."

We shall have occasion to refer again to the statute, and shall take up the problem first, irrespective of it and similar American enactments.

The facts in a general way, as to which we are to ascertain the law, are these: A makes his will; subsequently he makes a will which revokes the former one, either because it is inconsistent therewith or because it contains an express revocation of former wills. He then destroys this second will or otherwise revokes it. What effect has his action on the prior will which is still in existence?

The question appears to have been first raised in England in Chancery in the case of *Ex parte Hellier*,¹ where it was decreed that the cancellation of the second will did not set up the first. Sir George Lee said that the execution of the second will is a revocation of the first, though the second be afterwards canceled. This was a case of personal property, and of course the question of the revocation of the

¹ 3 Atk. 798 (1754).

first was decided apart from the provisions of the Statute of Frauds.

The next case arose at common law, and under the Statute of Frauds. It was *Goodright & Glazier v. Glazier*.² It there appeared that a will was made in 1757; a second in 1763. The former was never canceled; the second was canceled by the testator. Both wills were in the testator's custody at the time of his death; the second canceled, the first uncanceled. A verdict in ejectment was given in favor of the heir-at-law, as against the devisee, who was devisee in both wills. Lord Mansfield, in granting the rule for a new trial, remarked that in *Ex parte Hellier* (*supra*) Atkins only reported what passed in Chancery and there might be other circumstances appearing to the Ecclesiastical Court which might amount to a revocation of a will of *personalty*. He then went on to say, "Here, the testator has, by both wills, devised the lands in question to the defendant. His canceling the second is a declaration 'that he does not intend that to stand as his will.' Does not that speak, 'that his first will shall stand?' If he had intended to revoke the first will when he made the second, it must have operated as a declaration 'that the defendant should *not* take.' But that could not be his intention; because he devises to the defendant by both."

This reasoning is not very convincing, unless Lord Mansfield went upon the theory that the second will did not contain any express clause of revocation, and that therefore it could only be a revocation of the first if it took effect as a will, namely, if it gave the property to some one else than the devisee in the first will, in which case it would of course supersede it. In accordance with such a view of the case is the following paragraph from the opinion:

"Here the intention of the testator is plain and clear. A will is ambulatory till the death of the testator. If the testator lets it stand till he dies, it is his will; if he does not suffer it to do so, it is *not* his will. Here he had two. He had canceled the second; it has no effect, no operation; it is as no will at all, being canceled upon his death. But the former, which was never canceled, stands as his will."

² 4 Burr. 2512 (1770).

This view may well be taken, if, as stated, the second will contained no clause of revocation, and several courts have taken this to be all that was in issue in the case.⁸ It is true that in Burrow's Report no mention is made of an express clause of revocation in the second will, but in the report in Buller's *Nisi Prius* 266, and also in the report in Lofft, 575, it is said that the second will contained an express clause of revocation of all former wills. If this be true, then it appears that Lord Mansfield's reasoning as to the intention of the testator is unsatisfactory, for if the testator supposed the second will was a complete revocation of the first, he may have canceled it with the idea and intention of dying intestate. And such a hypothesis is at least as reasonable as that he intended his former will which he had declared revoked to be again his will.

Mr. Justice Yeates said "A will has no operation till the death of the testator. This second will never operated; it was only intentional. If by making the second he intended to revoke the former, yet the revocation was itself revocable; and he has revoked it."

This language seems also to point to a view that the case was not one of express revocation, or why the words "if he intended to revoke?" The justice went on to say that "Hellier's Case (*supra*) might be rightly determined; there might be collateral evidence of an intention to revoke."

Both this language and that of Lord Mansfield (*supra*) seem to indicate that the court thought the ascertainment of intention important as bearing on the question of the revival of the former will.

Justice Yeates then quoted the Statute of Frauds that "no devise in writing of lands, . . . shall be revocable otherwise than by some other will or codicil in writing, or other writing *declaring the same*, or by burning it; but all devises and bequests of lands, . . . shall remain and continue in force until the same be burned, etc.; or unless the same be altered by some other will or codicil in writing or other writing of the devisor, signed in the presence of three or four witnesses, *declaring the same*." He said, "Now

⁸ James v. Marvin, 3 Conn. 576 (1821); Colvin v. Warford, 20 Md. 357 (1863).

here are none of these circumstances used in what is pretended to be a revocation of this first will. Therefore the first will stands good." *Quære*, does this mean that the Justice understands that the second will contained no *declaration* (which word he italicizes) of a revocation, or does he mean that whether it contains such declaration or not, it can never be operative as a revocation till the death of the testator?

The above quotations and comments show how uncertain it is, exactly what was intended to be decided in this case. The court seems to intimate that the intent of the act of cancellation is important; it is not clear whether the revocation was express, or sought to be implied merely from certain inconsistencies in the two wills. It is hardly a case from which to deduce broad legal principles.

The same observations apply to the *dictum* of Lord Mansfield in *Harwood v. Goodright*,⁴ where he says "it is settled, that if a man by a second will revoked a former, yet, if he keep the first will undestroyed, and afterwards destroy the second, the first will is revived." This was not a case of express revocation, but merely of alleged inconsistency in the two wills.

The same judge delivered a contrary *dictum* in *Burtonshaw v. Gilbert*.⁵ That was a case of trespass. Plea, justification under authority of X, surviving devisee of the lands in question under the will of G dated 1759. Issue on the validity of said will. G made a will in 1759. He afterwards said it was not to his liking, and made a new will in 1761, with different dispositions of his property and an express clause of revocation of former wills. The will of 1759 was in duplicate, and the duplicate which G had at the time of making that of 1761 was torn up by his order. The other duplicate was in the hands of a devisee. He afterwards sent to his solicitor for the will of 1761, and on his death it was found canceled. The evidence showed that he had a few days before his death sent for a solicitor to make him a new will. The other duplicate of the will of 1759, above mentioned, was found uncanceled in his room with

⁴ Cowper, 87, 91 (1774).

⁵ Cowper, 49 (1774).

other papers. *Held*, he died intestate. Lord Mansfield: "He executes it (his intention to do away with his former will) by a new will in 1761, which is a complete, legal and effectual will; and if he had died immediately after, whether he had canceled the former or not, it would have been revoked; because at the end of the second will there is a declaration by which he revokes all former wills." He then goes on to hold that the cancellation is also sufficient to revoke finally the will of 1759 and put it beyond possibility of revival. Mr. Justice Aston concurred on the latter ground.

The above language shows that the revocation by the later will was looked upon as an executed act. If it is so, it is hard to see how it can be itself rescinded on the ground that it is put in a will which is ambulatory. Either Lord Mansfield contradicts himself or he decided *Goodright v. Glazier* on the ground that the second will in that case contained no express revocation.

The case of *Goodright v. Glazier* has, it is said,⁶ established the doctrine that, at common law the revocation of a revoking will revives the prior revoked will. This is said to result by law; it is not a presumption and proof to the contrary is not receivable. And it makes no difference whether the revoking will is such by virtue of an express revocatory clause therein contained or because it contains dispositions of property inconsistent with those of the prior will. And this, in spite of the language used in the case relative to testator's intention; for certainly the court thought an inquiry into the intention of testator important enough to discuss it and to reach a conclusion which they thought in accordance with his intention.

The Ecclesiastical Courts have not followed the seeming trend of *Ex parte Hellier* (*supra*) in holding that the presumption is adverse to a revival. Such seemed at first to be their attitude, but it early came to be settled that there was no presumption either in favor of or adverse to a revival. It was said to be a pure question of intention, and such

⁶ 1 Jarm., Wills, 136 (Fourth Edition); 1 Wms., Executors (Fifth American Edition), 154-156. But see Powell, Devises (Second Edition), 526.

intention was to be gathered from any circumstances in the case.⁷ This view of the law, at least, has the merit of getting at the justice of a case. Whether it can be sustained under the provisions of the Statute of Frauds as to revocation, we shall discuss later.

Turning, now, to the American law, we find that the Statute of Frauds, with respect to wills, has been substantially adopted in almost all the states. The modifications, when there are any, in most instances are a reduction in the number of witnesses required in the execution of a will.

A number of states have legislation bearing on the precise question at issue. Virginia has adopted the Statute of 1 Victoria, C. 26, Section 22, bodily,⁸ so that in that state a revival of the prior will, upon destruction of the revoking one, can only be accomplished by a re-execution.⁹

Alabama,¹⁰ California,¹¹ Kentucky,¹² Missouri,¹³ and New York¹⁴ have statutory provisions almost identical in

⁷ In *Moore v. De La Torre*, 1 Phillim. 375 (1816), Sir John Nicholl said: "If it were necessary to decide the point, I should hold that it was not the presumption when B was canceled that A should revive." In *Moore v. Moore*, 1 Phillim. 406 (1817), the Court of Delegates was much pressed with Lord Mansfield's decision in *Goodright v. Glazier*, and seemed dissatisfied with it; they refused to adopt it. "The clear result of all the cases, the common-sense of them, is that it must be ascertained whether it was or was not the intention of the deceased that the will should stand." *Hooton v. Head*, 3 Phillim. 26, 32 (1819), per Sir John Nicholl. See also *Wilson v. Wilson*, 3 Phillim. 543, 554 (1821); *Usticke v. Bawden*, 2 Add. 116, 125 (1824); *Welch v. Phillips*, 1 Moore P. C. 299 (1836); *James v. Cohen*, 3 Curt. 770 (1844).

Since the Wills Act 1 Victoria, C. 26, Sec. 22, a will of personality, like one of realty, cannot be revived by the destruction or revocation of a later revoking will: *Major v. Williams*, 3 Curt. 432 (1843); *Saunders v. Saunders*, 6 No. Cas. 524 (1848).

⁸ Sec. 9, Chap. 118, Code of 1873.

⁹ *Rudisill v. Rodes*, 29 Gratt. 147 (1877).

¹⁰ R. C. Sec. 1933.

¹¹ Code Sec. 1297. In *re Lones*, 108 Cal. 688; 41 Pac. 771 (1895), held that a third will, revoking a second, which had in turn revoked a first, did not revive the first because no such intention appeared on the face of the will.

¹² Gen. Stat. C. 113, Sec. 11; *Minor v. Guthrie*, 4 S. W. 179 (1887).

¹³ Wagn. Stat. 1366; *Beaumont v. Keim*, 50 Mo. 28 (1872).

¹⁴ 2 Rev. Stat., C. 6, Tit. 2, Sec. 53.

wording,¹⁵ and evidently copied from one another, which provide for the case in question. There is some doubt from the wording just what is intended, it being said there shall be no revival "unless it appear by the terms of such revocation that it was his intention to revive." The inquiry suggests itself, Does this mean that in case of a revocation by burning, tearing, etc., if testator at the time of doing the act states it to be a revival of his earlier will, that this is effective to revive it? This question has been answered in the negative in New York.¹⁶ X made a will and subsequently made a revoking will. Afterwards in the presence of witnesses he tore up the revoking will, saying that he was satisfied with the old one and would have it. The first will was in existence undestroyed at his death. *Held*, that under the statute there could be no revival without express republication, and the first will was not revived.

It would be hard to imagine a clearer case for revival short of express republication than the above, and, if the case is followed elsewhere, it means that in these states the statute is practically the same as the English Statute of 1 Victoria. This seems to be the intent of the enactment, though it is vague in expression.

The earlier American cases in point were decided in Pennsylvania. *Lawson v. Morrison*,¹⁷ contains *dicta* which cover the case. There A made a will in 1775, another in 1777, which he revoked; another in 1779, which was traced to her possession, but not found after her death. It was argued that the presumed destruction of the will of 1779 set up the will of 1775. There was no evidence that the will of 1779 contained a revoking clause or that it was inconsistent with that of 1775. The court held: First, that the

¹⁵ The New York statute is given: "If, after the making of any will, the testator shall duly make and execute a second will, the destruction, canceling or revocation of such second will shall not revive the first will unless it appear by the terms of such revocation that it was his intention to revive and give effect to his first will; or, unless after such destruction, canceling or revocation, he shall duly republish his will."

¹⁶ *In re Stickney's Will*, 52 N. Y. Supp. 929 (1898). See also *Ludlam v. Otis*, 15 Hun. 410 (1878).

¹⁷ 2 Dall. 286 (1792).

will of 1779 could not be said to be a revoking will, since its contents were not known to the court;¹⁸ second, that the presumption was that A herself destroyed the will of 1779;¹⁹ third, that if this was true, then the will of 1775 stood, for no one could have a will till he died, and when A died she had a subsisting will,—that of 1775; fourth, and this must be true, unless it was clearly proved that A had destroyed the will of 1779 with intent to die intestate; fifth, McKean, C. J., said: “Should a contrary opinion hold, to wit, that the first will was revoked at the instant the second was executed, yet the canceling of the second by the testatrix herself is a revival of the first if undestroyed. (Citing *Harwood v. Goodright*.)

Of course, all this is *dictum*, for the court held there was no sufficient evidence that the later will was a revoking will. The court, however, takes a different view from any yet examined, viz.: that there is a presumption of revival (whether the revoking will is so, either by reason of inconsistency or express revocation), but that such presumption may be met by proof that testator intended to die intestate.²⁰

In *Flintham v. Bradford*,²¹ which was an ejectment, the question was whether a will of 1821, which had been revoked by a will made in 1824, has been subsequently revived by the cancellation of the later will, and whether parol evidence was competent or admissible to rebut the presumption of an intent to revive. The court held the destruction of the second will revived the first, because a will is ambulatory till the death of the testator, and rejected the evidence of intent. Coulter, J., said: “The other rejected evidence . . . would, in effect, if allowed to prevail, defeat the rule in regard to the effect which the cancellation of a posterior will has on a prior will preserved by

¹⁸ See *Harwood v. Goodright* (*supra*); *Freeman v. Freeman*, 5 D. M. & G. 704 (1854); *Cutto v. Gilbert*, 9 Mo. P. C. 131 (1854).

¹⁹ *Brown v. Brown*, 8 Ell. & Bl. 876 (1858); *Finch v. Finch*, L. R. 1 P. & D. 371; *Burns v. Burns*, 4 S. & R. 295 (1818); *Newell v. Homer*, 120 Mass. 277 (1876).

²⁰ In *Boudinot v. Bradford*, 2 Yeates (Pa.) 170 (1797), the court said that parol evidence was admissible to show *quo animo* the cancellation of the second will was done.

²¹ 10 Pa. 82 (1848).

the testator, and would also amount to a revocation by word of mouth. I will admit that if it clearly proved that the testator, at the time he canceled the posterior will, intended to die intestate, but had not the prior will then in his possession or power, so as to annul or destroy it, that such intent existing at the time of cancellation, and connected with it, might be given in evidence as part of the *res gestæ*.²²

This case comes very close to the common-law rule. The field for evidence of intention is by it very much limited. The common-law doctrine is adopted in New Jersey.²³

In Massachusetts, in a comparatively late case, *Pickens v. Davis*,²⁴ the Supreme Court, with most of the statutes and decisions before it, has adopted the view that there is a presumption against revival, but this presumption may be overcome by evidence of intent to revive, and has even gone so far as to hold that declarations of the testator made prior and subsequent to the revocation of the second will are admissible to prove the *quo animo*.²⁵ The court said: "Evidence of declarations made at other times is to be received with caution. They may have been made for the very purpose of misleading the hearer as to the disposition which the speaker meant to make of his property."

The Supreme Court of Georgia,²⁶ in a *dictum*, has taken the same view, apparently, though there is an earlier case which seems somewhat inconsistent with this view.²⁷ The same rule appears to prevail in South Carolina.²⁸

²² Cited with approval, *Comm. v. Stauffer*, 10 Pa. 350 (1849).

²³ *Randall v. Beatty*, 31 N. J. Eq. 643 (1879).

²⁴ 134 Mass. 252 (1883).

²⁵ See, also, *Williams v. Williams*, 142 Mass. 515 (1886), where a testator executed three wills, each containing a revocatory clause, and each of which he published as his last will. At the time he executed the third will he said he would keep them all till he made up his mind which he wanted for his will. He afterwards destroyed the first and third. *Held*, that these facts warranted a finding that the testator, in destroying the third will, intended to revive the second, and it should be admitted to probate.

²⁶ *Lively v. Harwell*, 29 Ga. 509 (1859).

²⁷ *Barksdale v. Hopkins*, 23 Ga. 332 (1857).

²⁸ *Taylor v. Taylor*, 2 Nott. & McC. 482 (1820).

Tennessee seems to have adopted the rule of the Ecclesiastical Courts of England.²⁹

It is not clear what rule is followed in North Carolina.³⁰

A number of jurisdictions have adopted the rule now enforced in England, under 1 Victoria, without any express statutory provision, founding their decisions on an interpretation of the provisions of the Statute of Frauds as to revocations.

In *Bohanon v. Wolcott*,³¹ the facts were that G made a will in 1829. In 1831 he made a second, expressly revoking all former wills. He afterwards expressed an intention of revoking his last will and applied to B to write a new one for him. He handed B the will of 1831, with interlineations and erasures, and declared he had made them and had done away with that will. G expressed a desire to B that if the new will should not be published the will of 1829 should go into effect. He died before publishing the new will. *Held*, first, The will of 1831 was validly canceled; second, That of 1829 was not republished. Lord Mansfield's opinion in *Goodright v. Glazier* was said not to be sound. Smith, J., said: "A will is ambulatory, and has no effect until the death of the testator. If he lets it stand till his death, it is his will, but if revoked it cannot be. But when revoked, it cannot be considered as having either a present or a potential existence, and must require some express and direct act of the testator, which, in fact, does not revive the defunct will, but adopts it as the present will of the testator, and it is to be regarded as a new testamentary act of the party."³²

In *Hawes v. Nicholas*,³³ probate was asked of an instrument dated 1873. The contestants offered to prove that testator made and executed, with due formalities, another will in 1879, in which he expressly revoked all former wills, and that he afterwards destroyed the same. The contention was that he died intestate. The Texas Statute³⁴ pro-

²⁹ *McClure v. McClure*, 86 Tenn. 173 (1887).

³⁰ *Marsh v. Marsh*, 3 Jones L. 77 (1855).

³¹ 1 How. (Miss.) 336 (1836).

³² See, also, *Colvin v. Warford*, 20 Md. 357 (1863).

³³ 72 Tex. 481 (1889).

³⁴ R. S., Art. 4861.

vides for revocation "by a subsequent will, codicil, or declaration in writing executed with like formalities." The court declared an intestacy, saying: "A written declaration properly executed as effectually revokes a will from the date of its execution as does its destruction. If the purpose to revoke is sufficiently expressed, and the writing is properly executed it cannot be controlled or limited by the name given the instrument or by its containing other provisions."

In Connecticut in the absence of statutory provision as to revocation the same conclusion was reached.³⁵ There was an express clause of revocation, and it was held that the destruction of the later will did not revive the former.

Subsequently a statute was passed in Connecticut providing that no will should be revoked except by burning, etc., "or by a later will or codicil." This differs from the wording of the Statute of Frauds in omitting the phrase 'or other writing declaring the same.' In *Peck's Appeal*,³⁶ the court suggested that the aspect of the above question was changed by the statute, and intimated that under it a will containing even an express clause of revocation must take effect as a will before it could have any effect on a former will. The case was, however, one of implied revocation, because there was no evidence of the existence of an express clause of revocation in the second will. Except for this *dictum*, the authority of *James v. Marvin* is unimpaired.

The distinction noted between the cases of *James v. Marvin* (*supra*) and *Peck's Appeal* (*supra*) as to express and implied revocations is carried out in Michigan. In *Scott v. Fink*³⁷ the second will contained an express revoking clause and was burned at the direction of the testator. It was held that this did not revive the first will,³⁸ and a distinction was drawn between such a case as this and one where the revocation occurred, because the second will was inconsistent with the first.

³⁵ *James v. Marvin*, 3 Conn 576 (1821).

³⁶ 50 Conn. 563 (1883).

³⁷ 45 Mich. 241 (1881).

³⁸ *Stevens v. Hope*, 52 Mich. 65 (1883).

In *Cheever v. North*,⁸⁹ on application for probate of a will, evidence was offered of the execution of a second will. The jury found that the second "made a complete disposition of his estate." There was no evidence and no finding as to whether the second will contained, in terms, a revocation of the prior will. The court admitted the first will to probate, holding that while an express revocation operated instantaneously to abolish a former will, in such a case as this the second will must take effect at testator's death to be a revocation of the earlier will.

We have now taken an exhaustive survey of the views of the various courts on this subject, and it remains merely to comment briefly upon them. Let us first discuss the case where an express clause of revocation is inserted in the later will.

It is believed that the problem really resolves itself into this question, What is a revocation under the Statute of Frauds? If a revocation has taken place by the execution of the second will, then the revoked instrument can never be set up again save by certain formalities prescribed by the statute. If, on the other hand, no sufficient statutory revocation has taken place, the original will has been in full force all along, and it is rather incongruous to speak of the "revival" of something that has never been dead.

The statute provides certain modes for the revocation of a will, viz. : First, burning, tearing, etc. ; second, another will or codicil ; third, a writing executed with formalities like those of a will, declaring the same. If any of these requirements are fulfilled the will is revoked. Let us see how.

The making of a will is a deliberative act ; therefore, it is subject to change up to the time of death ; it is the expression of a future purpose—an intention, and, therefore, during life, cannot be irrevocable and final. It is executory. On the other hand, a revocation is executed. It is the expression of a present purpose. If it means anything it means that a testator has fully and once for all made up his mind that a given paper does not represent his present wish as to the final disposition of his property. Now, if the law

⁸⁹ 106 Mich. 390 ; 64 N. W. 455 (1895).

requires him to manifest that wish by certain formalities, and provides a method for destroying the efficacy of the formalities he has gone through, why, if he ever wishes to re-establish such a will, should he not be required again to manifest his purpose as though no will existed?

It certainly never was contended that after the revocation of a will by cancellation the testator could, by a parol declaration, revoke the cancellation and declare a change of purpose. It is hard to imagine that any court would hold that a duly signed and executed paper declaring a revocation could be done away with by any act less than a republication or re-execution of the revoked will.⁴⁰ If this is true, it is because a revocation is an act different in nature from a mere testamentary disposition.

What, then, gives a clause of revocation, contained in a will, a different character from any other form of revocation? It is said that it is part of a will, and that the will is ambulatory, consequently the clause of revocation is ambulatory, and, if ambulatory, it is subject to be abolished at any time up to the death of the testator. If this be true it can have no final effect until the death of the testator. Consequently, the prior will remains unaffected until that time. If, in the meantime, the will containing the clause of revocation is revoked, it leaves the prior will just as it was at the time of its execution,—in full force.⁴¹

Now, either this proposition is true, in which case there must be a revival as matter of law; or it is false, in which case there cannot possibly be a revival.

Let us examine the books to determine the opinion of the courts on this question of the inseparability of the revocatory clause from the rest of the will.

"An express revocation is a positive act of the party, independent of the will which may happen to contain it, and operating instantaneously and *per se*. As a clear consequence resulting from this principle, all prior wills are

* In *Walton v. Walton*, 7 Johns. Ch. 258 (1823), it was held that a contract to convey land which had been devised was a revocation, and that the devise could not again be set up except by express republication.

⁴¹ 1 Redf. Wills, Sec. 328; *Goodright v. Glazier*, *supra*.

recalled or reversed,—the proper meaning of the word revoked,—and must remain in this condition until revived by republication.”⁴²

“A man has power, then, to insert in his will a revocation that shall be operative, though it turn out that the will itself shall be inoperative. Having power, a man may, if he pleases, insert in his will a revocation that shall be operative independently of the will.”⁴³

“But a clause in a subsequent will, which in terms revokes a previous will, is not only an expression of the purpose to revoke the previous will, but an actual consummation of it, and the revocation is complete and conclusive, without regard to the testamentary provisions of the will containing it.”⁴⁴

“If it can be proved that a later will was duly executed, attested and subscribed, and that it contained a clause expressly revoking all former wills, but evidence of the rest of its contents cannot be obtained, it is nevertheless a good revocation.”⁴⁵

“The clause of revocation is not necessarily testamentary in its character. It might as well be executed as a separate instrument. The fact that it is inserted in a will does not necessarily show that the testator intended that it should be dependent on the continuance in force of all the other provisions by which his property is disposed of.”⁴⁶

In the light of these quotations, it does not seem too much to say that there is no difference between this sort of revocation and any other, and that it is not ambulatory as some of the cases have held.⁴⁷ If this is so, the revocation is complete, and nothing but a new testamentary act, in the form prescribed by statute, will suffice to revivify the earlier will.⁴⁸

⁴² Hosmer, C. J., *James v. Marvin*, 3 Conn. 576 (1821).

⁴³ *Barksdale v. Hopkins*, 23 Ga. 332 (1857).

⁴⁴ *Colvin v. Warford*, 20 Md. 357 (1863).

⁴⁵ Gray, C. J., *Wallis v. Wallis*, 114 Mass. 510 (1874).

⁴⁶ *Pickens v. Davis*, 134 Mass. 252 (1883). See also the language quoted from *Bohanon v. Wolcott*, *supra*, p. —; *Hawes v. Nicholas*, *supra*, p. —.

⁴⁷ *Lawson v. Morrison*, *supra*, p. —; *Flintham v. Bradford*, *supra*, p. —. 1 Jarm. Wills (Fourth Edition) 136.

⁴⁸ *Bohanon v. Wolcott*, *supra*, p. —; *Scott v. Fink*, *supra*, p. —.

It is believed that either one of two positions is inevitable; that there is a revocation and no revival; or no revocation, and the former will remains unimpaired. Nevertheless, some courts have, as we have seen, taken cognizance of the intention of the testator, for or against the revival. This may be well enough where no statutory method of revocation is prescribed, and where no formality is necessary to the making of a will, but if a will is revoked by a clause inserted in a later will, then it is gone. However much the testator may intend to set it up again by destroying the revoking will, his intention can have no effect, and a court should not hear evidence of intention, for the statute provides that no testamentary intent is sufficient unless evidenced in certain ways. On this ground such cases as *Pickens v. Davis*⁴⁹ and *Wallis v. Wallis*⁵⁰ seem to be ill-considered.

On the other hand, if the second will is no revocation, its destruction as matter of law must leave the first in force, and the fact that testator said he did not intend it to be in force, but intended to die intestate, cannot alter the status of the first will. The statute provides against the revocation of wills by word of mouth, and it nowhere provides that the cancellation of a revoking will, with intent to die intestate, shall revoke a former will. Therefore, evidence of intent is immaterial and irrelevant here. On this ground *Flintham v. Bradford*⁵¹ seems to be erroneous.

A very different question is raised where the second will contains no clause of revocation, but simply devises the property in a different manner from the first. In such a case, if the second will takes effect upon the death of the testator, the first cannot, and, of course, the second does, take effect as being the expression of the testator's latest intent. Many of the cases⁵² recognize this distinction, which is very well brought out in the Michigan cases.⁵³ In fact, the Michigan

⁴⁹ *Supra*, p. —.

⁵⁰ *Supra*, p. —.

⁵¹ *Supra*, p. —.

⁵² *James v. Marvin*, *supra*, p. —; *Colvin v. Warford*, *supra*, p. —.
⁵³ *Bohanon v. Wolcott*, *supra*, p. —.

⁵⁴ *Scott v. Fink*, *supra*, p. —; *Cheever v. North*, *supra*, p. —.

Supreme Court takes the most logical and consistent view of the problem, and the one which, it is submitted, ought to prevail in jurisdictions where the Statute of Frauds or similar enactments are in force, and where there is no such statute as 1 Victoria, C. 26, Sec. 22. It would tend greatly to simplification of the now hopeless confusion, were all the states to follow the lead of England and the states heretofore mentioned,⁵⁴ by direct legislation covering the point in controversy. The statute of 1 Victoria was suggested by long experience in England, and has been found quite satisfactory in its operation.

Owen J. Roberts.

Philadelphia, August 1, 1900.

⁵⁴ *Supra*, p. —.

THE STUDY OF THE NATURAL LAW.

When the multiplying complexities of civilized life require an increased complexity in the rules of law governing the relations of men with one another, the legislator or judge who fixes these rules finds that more and more of his time must be devoted to dealing with the new and artificial relations which men assume towards each other, and that less and less time need be given to considering the old, essential relations which have always existed. The essential relations of one man towards another in the community were weighed by the earliest lawgivers; in fact, almost every community owes much of its growth to the desire of preserving these relations undisturbed; of securing to the members of the community their rights to life, liberty and property. The securing of these rights having been largely accomplished in the early times, lawgivers are often engrossed with the more intricate but less important problems which arise. Thus to-day most great business enterprises are conducted by associations of men called corporations. The associates furnish different amounts of capital, and some direct the business for all. Agents are hired and money is often borrowed, and the resulting complexity of relations must be fixed by rules of law. How it shall be fixed is for the lawmaker to decide, and frequently he need consider only the economic good of the community, for these artificial relations of men seldom squarely raise an issue as to what is necessarily right or wrong, and he may arrange the new rules in any one of numerous ways quite consistently with the proper solution according to ancient rules of any moral question which may lurk in the background.

Partly as a result of this, some students of jurisprudence, who see legislators arranging and altering these artificial human relations with unquestioned authority, come gradually to believe that the older relations which are considered essential have likewise sprung up through the arbitrary exercise of authority or from general agreement as to expe-

diency, and that public opinion has been duped by custom into thinking them essential or natural to human beings united in society. Many modern theorists say that we have no rights except those given us by the political community of which we are members, and that the community may at any time withdraw its gift, if the withdrawal can be legally arranged, on considerations of political or economic expediency; hence, nobody has any natural, inherent rights. These views are stripped of their plausibility when we consider the community in its origin, for free moral agents existing outside of political communities certainly have rights; and such agents entering a political community may not, nor do they surrender to the sovereignty the right to control every action of their lives. As our Declaration of Independence proclaims, some rights are inherent and inalienable.

The false doctrine denying men all rights save those granted by the community can be traced directly to Hobbes, and its companion, the doctrine that moral right and wrong have no meaning save as referred to a supposedly shifting public opinion, was spread by the pantheistic school of Fichte, Schelling and Hegel, which Kant founded. Kant's idea that every man is a moral law for himself paved the way for Hegel's doctrine of subjectivity, the denial of all objectivity in the moral order, and the consequent belief that no such thing as natural law exists. In other words, that there is an absolute standard of right and wrong which a legislator may hold to be true for all is denied; and so we are told that the subject of moral obligation and the natural law should be excluded from the study of jurisprudence, which thus becomes a study of purely temporal public expediency as the sole determinant of what the law shall be and of purely temporal private expediency as the sole determinant of whether you or I shall keep the law or break it. The effect of the physical force with which a lawmaker may menace transgressors has in this way come to be exaggerated since Austin's time.

• The radical evolutionistic notions about the birth and development of reason and of moral concepts increase the doubt as to the existence of natural law, for they undermine

belief in the definiteness of human nature itself. All these doctrines combine to make many view lawmaking and other governmental activity from a purely material standpoint of economic and political interest. These material views are forcibly exemplified in the utterances of some of our prominent men—men of thought and action, on the international questions between Great Britain and the Dutch Republic and between China and the nations which want to seize her territory, as well as on some of the questions which have perplexed our own country for several years. Although a proper study of international law peculiarly requires the consideration of what the natural law dictates, we hear even some professors of international law scouting the natural law; and, by an easy sequence, we have the moral aspect of these questions neglected. To the inquiry, "Have they a right to that land?" answer is made, "Their economic fitness is greater: the natives would never make the most of its advantages;" or "The impact of races has always gone on and always will: the weak must be replaced by the strong, for the survival of the fittest is the law of evolution; and evolution towards a higher type is the chief principle of nature."

This is to ignore the moral nature of actions performed by the representatives of big nations—a mistake which is lamentable, but which, on account of the following reasons as well as those mentioned before, is not very surprising. We sometimes read in works on corporations that the managers of a big corporation will vote that measures be taken to benefit it which they would not dream of taking to advance their own private concerns. The corporation, and, of course, the nation in a much higher degree, seems to be a thing by itself, a great engine of civilization and progress which must forge ahead, impersonal, without a body to be punished here or a soul to suffer hereafter. The tremendous interests at stake dazzle the mind; the great ends in view seem to justify the means pursued, and there is the further fact that the human agents of a big corporation or nation rarely suffer immediate punishment and often win profit and praise for wrongful actions committed in a cause wherein thousands of other people are interested, so that the temporal

retribution of moral delinquency seems to be lacking. These facts, combined with the doctrines stated above, obscure the wrongfulness of such actions, for, although the primary precepts of the law of nature are self-evident; yet, when the less evident precepts are involved in the tangled mazes of some modern human relations, they are often viewed improperly. Now associated activity with all its complications is daily increasing in importance, and we should be very careful to foster correct views of it. In the case of the old and much better understood relations of one man with another, the economic principles of expedience and the survival of the fittest will encounter more resistance, for the truth is pretty plain, but such principles are very seductive. The study of the natural law may then be important in considering the smallest private affair or the greatest international question, since it enables us to take a scientific, universal view of rights and obligations.¹

Looking at this study in another aspect, we find that it is peculiarly helpful under the new method of teaching law whereby the student is turned at once to reasoning out systematic principles of law from cases, for the student will do his task better if he knows the underlying principles of life and action on which human laws must be based. Much of his work is really philosophic, as Markby proves (*"Elements of Law,"* 4th Ed., pp. xi, xii), and he need not fear lest he build his foundations too deep. This study gives jurisprudence solidity and dignifies it by exhibiting it as a real and not as a formal science (see Holland's *"Elements of Jurisprudence,"* 8th Ed., p. 6). It introduces unity into the study of law, evincing that the primary legal principles and

¹A good example of the need of such views is found in the notion that a corporation's rights inhere in an entity created by the Legislature or otherwise, and not in the corporate associates. This notion has introduced into scores of legal decisions much confusion, which would have been avoided had the principle of the natural law that such rights can inhere only in real persons been well understood. How far these errors can be carried is seen in Holland's *"Elements of Jurisprudence,"* eighth edition, at page 85, where that gifted thinker, without piercing the superficial phenomena, speaks of the possession of rights by certain collections of property, as by the estate of a bankrupt or by an intestate's estate before administration.

the main parts into which the subject may be divided are matters of categorical exactness, and not merely convenient rules of thumb and catalogue headings.

Some account of the scientific treatment of natural law by ancient and modern writers will be found in Holland's "Elements of Jurisprudence," 8th Ed., pp. 29-36. It has been most thoroughly handled by the schoolmen, particularly St. Thomas Aquinas, and by certain of their successors. These men built up, partly from Aristotle's treatises, a co-ordinated synthesis of all laws, eternal and natural, as well as those made by special divine command or by human enactment, which will be outlined below. Their work has permeated writings on the first principles of law whose authors know them only indirectly. Among them all Suarez (1548-1617) occupies a very prominent place, and his monumental synthesis will remain as one upon which succeeding centuries have made but few improvements. Of him it is said in Halleck's "International Law" (3d Ed., Vol. I, p. 11), "Suarez was a Spanish Jesuit, and the most acute casuist² of his age. He was the first to point out, in his treatise 'De Legibus et Deo Legislatore,' the distinction between natural and consuetudinary law, and to show that international law rests not only on the principles of justice, but also on the usages of nations." (Cf. Holland's "Elements of Jurisprudence," 8th Ed., p. 346.) These were by no means the only services which he performed for jurisprudence; and since his work referred to above displays the carefulness of the conservative scholar besides the brilliancy of the original thinker, it is made the basis of the following rough sketch of the place and importance of natural law in the study of jurisprudence; and it is recommended to those who are interested in the subject.

We shall look first at the scholastic conception of the Eternal Law, whose scope embraces the whole created universe and any other universe which may have existed in the past or which may exist in the future. We shall see later that God wills to bind His creatures to certain lines of action—the natural lines of each

²A casuist is one who academically applies moral principles to supposed cases.

creature's being. This conservation of the natural order of all created things is the object of the Eternal Law. "The Eternal Law thus stated takes in manifestly a wider field than that of moral action. There is, in fact, no action of created things that is not comprehended under it. It comprises the laws of physical nature and the action of physical causes no less than the moral law and human acts. It is the one primeval law of the universe, antecedent to all actual creation, and co-eternal with God. And yet, of course, not as necessary as God: for had God not decreed from all eternity to create, neither would He have passed in His own Divine Mind this second decree, necessarily consequent as it is upon the decree of creation; namely, that every creature should act in the mode of action proper of its kind. This decree, supervening from eternity upon the creative decree, is called the Eternal Law.

"Thus the laws of physical nature in the highest generality are identified with the moral law. The one Eternal Law embraces all the laws of creation. It has a physical and a moral side: on the former, it effects; on the latter, it obliges; but on both sides it is imperative: and, though in moral matters it be temporarily defeated by sin, still the moral behest must in the end be respected as surely as the physical behest. The defeat of the law must be made good by punishment or by atonement. It is important to hold this conception of the Eternal Law as embracing physical nature along with rational agents. To confine the law, as modern writers do, to rational agents alone, is sadly to abridge the view of its binding force. The rigid application of physical laws is brought home to us daily by science and by experience: it is a point gained, to come to understand that the moral law, being ultimately one with those physical laws, is no less absolute and indefeasible, though in a different manner, than they.

"It is hard for us to conceive of laws being given to senseless things. We cannot ourselves prescribe to iron or sulphur the manner of its action. As Bacon says (*'Novum Organum,'* i, Aphorism 4): 'Man can only put natural bodies together or asunder: nature does the rest within.' That is, man cannot make the laws of nature: he can only

arrange collocations of materials so as to avail himself of those laws. But God, who makes creatures to be of certain natures, makes the law, issuing His command that every creature, rational and irrational, shall act each according to its nature." (Rickaby, "Mor. Phil.," 2d Ed., pp. 129-132.)

The existence of this law in God, of which even pagan philosophers such as Plato and Cicero had some knowledge, appears from the existence of His Eternal Providence. This Providence presupposes an external practical rule for disposing and governing created things. Moral creatures; that is, beings endowed with understanding and free will, such as men or angels, have the eternal law interpreted to them by means of subsidiary rules suitable to their nature. Human nature requires the human natural law; angelic nature, the angelic natural law. Our natural law is the sum of those rules which declare to the human intellect what is naturally right or wrong for human beings to do, and what God, therefore, having decreed the Eternal Law, approves or forbids. Thus, the natural law emanates from the Eternal Law and participates in its essence. But mankind puts the Eternal Law to use not in respect of itself but only as it is expounded and applied to human needs by our natural law, which through the medium of conscience interprets to each man how he shall comport himself in carrying out the universal order decreed by the Eternal Law. Mankind constitutes a part of all created existence, past, present and future, corresponding to the subordinate part which our natural law fulfils in relation to the Eternal Law. All the operations of the universe are directed to God's glory; and, consequently, there are some acts which the peculiar exigencies of no moral natures could make permissible; for example, blasphemy. Other acts, whose moral quality is due to the peculiarities of the human body with which the human soul is closely united, might have a different moral quality in the case of moral beings with somewhat different kinds of bodies. Thus polyandry is forbidden by the Eternal Law only inasmuch as our human conditions oppose it to our fulfilment of the object for which we are created in the way suited to us; and, therefore, in the way consonant with the eternal order. By our natural law, then, polyandry is absolutely prohibited.

"We have spoken of the law that governs the world, as that law has existed from eternity in the mind of God. We have now to consider that law as it is received in creatures, and becomes the inward determinant of their action. Action is either necessary or free. The great multitude of creatures are wholly necessary agents. Even in free agents most of what is in them and much that proceeds from them is of necessity and beyond the control of their will. Of necessary action, whether material or mental, we shall have nothing to say further. It is governed by the Eternal Law, but henceforth we have to do with that law only as it is received in free human agents as such, to be the rule of their conduct. The agents being free, the law must be received in a manner consonant with their freedom. It is proper to a free and rational being to guide itself, not to be dragged, but to go its own way, yet not arbitrarily, but according to law. The law for such a creature must be not a physical determinant of its action, but a law operating in the manner of a motive to the will, obliging and binding, yet not constraining it: a law written in the intellect after the manner of knowledge: a law within the mind and consciousness of the creature, whereby it shall measure and regulate its own behavior. This is our natural law. It is the Eternal Law in the mind of God, as made known to the rational creature, whereby to measure its own free acts.

"It is called the natural law; first, because it is found, more or less perfectly expressed, in all rational beings: now, whatever is found in all the individuals of a kind is taken to belong to the specific nature or type of that kind. Again, it is called the natural law, because it is a thing which any rational nature must necessarily compass and contain within itself in order to arrive at its own proper perfection and maturity." (Rickaby, "Mor. Phil.," 2d Ed., pp. 133, 134.)

We now ask ourselves the question, Is the natural law truly a law: are the rules of action which comprise it really imposed on us by divine precept, or do they indicate nothing but a certain force or faculty of our nature which we may term natural reason? A real law must depend on some lawgiver's will. But, it is argued, the dictates of natural

law are intrinsically necessary to man's nature, and independent even of God's will in the sense that no wish of God is needed to make murder, theft, falsehood, etc., abominable or to make certain actions estimable. We assert, however, that natural law is not only indicative of good and evil, but that it also contains a prohibition of what we should naturally avoid and a commandment of what we should naturally perform. God, who was free not to make us at all, in making us as we are and so that our natural intellect reveals certain duties to us, gave us a truly preceptive natural law, a sign manifested to everyone not impeded in the due use of reason and revealing the Divine Will in its particular desires that rational human beings shall be held to do or avoid this or that in consequence of their nature and its purpose. Whatever runs counter to right reason displeases God, and the contrary pleases Him, as must be, since His will is supremely just and cannot act save according to reason: therefore, natural reason, indicating what is in itself good or bad for mankind, shows that, according to Divine Will, one should be cultivated and the other avoided. God exercises a perfect Providence over mankind in accordance with His Divine Order. He likes what is intrinsically good and dislikes what is intrinsically bad; and in providing, therefore, that men shall do good and avoid wrong, He, as the Author and Governor of their nature, commanded these acts of commission and omission, obligating us to do or omit them. The sanction of His punishment follows disobedience.

Of course, God's right to oblige our wills goes beyond the direct precepts of the natural law, as is instanced by the precept to keep the seventh day holy. So does human authority, as, for instance, when human lawgivers proclaim that vessels on rivers shall display certain lights. In these cases, however, we are obligated to act in the manner commanded by reason of the authority of the lawgiver, who deems that if we act in a certain way it will be for the best interests of the community, and decrees accordingly. The actions in question are not in themselves matters of moral obligation, but become so when the law is made. The natural law, however, bidding us obey lawful authority, in-

directly commands or forbids whatever is commanded or forbidden by the Divine Lawgiver or by a just human lawgiver. In the case of the direct precepts of natural law, the prohibitive or commanding will of God is based on a judgment of the inherently necessary uprightness or baseness of certain acts performable by human beings. The acts forbidden are intrinsically unsuitable, and are not evil because forbidden, as Evodius says, but necessarily forbidden because evil.

As was stated before, many modern thinkers, denying that there is objective wrongfulness or rightfulness in any actions, deny the existence of natural law. They point to disagreements as to what is right and what is wrong. At these disagreements, however, we shall not wonder, when we recollect that natural law is a certain set of rules dealing with our duties; that these rules reside in the fallible human mind; and that the inclinations of the human will make us jump at pleasant conclusions in this sphere of knowledge, to a much greater degree than is the case when we are considering propositions which do not so directly affect our ease. Lawyers appreciate how true this is, for they see their most conscientious brethren stoutly maintaining the existence of this or that human law and thoroughly believing in it, which quite possibly they would be honestly ridiculing had they been retained by the other party and begun to ponder the matter with the wish of helping him.

"Besides printing, many methods are now employed to multiply copies of a document. Sometimes the document is written out with special ink on special paper: this sheet is called a stencil, and from it copies are struck off. We will suppose the stencil to be that page of the Eternal Law written in God's mind, which regulates free human acts. The copies struck off from that stencil will be the natural law in the mind of this man and of that one. Now, as all who are familiar with copying processes know too well, it happens at times that a copy comes out very faint, and in parts not at all. These faint and partial copies represent natural law as it is imperfectly developed in the minds of many men. In this sense, and, as we may say, subjectively, natural law is mutable, very mutable, indeed, save

in the case of the primary moral judgments as to doing good, requiting kindness, etc. Still, as nobody would say that the document had been altered, because some copies of it were bad, so it is not correct to say that natural law varies with these subjective varieties. Appeal would be made to a full and perfectly printed impression of the document, one rendering the stencil exactly. Natural law must be viewed in like manner, as it would exist in a mind perfectly enlightened concerning the whole duty of man, and exactly reproducing in itself that portion of the Eternal Law which ordains such duty. Were such a mind to discern a natural obligation to lie differently at two different times, all the relevant circumstances being alike in both cases, and the moral solution different, then only could the natural law be held to have changed." (Rickaby, "Mor. Phil.," pp. 147, 148.)

Aristotle asserts that some actions are necessarily evil; as, malevolence and envy, and likewise some external actions; as, theft. These, he says, are of their nature universally heinous. Although what is naturally good for us to do, but not morally necessary, may for special cause be forbidden, and be, therefore, bad for us to do, yet the state of its being bad is not natural to it, and on the removal of the prohibition it becomes good once more. If to hate God, for instance, had not some reason of intrinsic wickedness antecedent to any positive prohibition, it could be that it might not be forbidden. Why should that not be possible if the wrong were not wrong naturally and of itself? In the same way, lying is essentially wrong, and "we are enabled to answer Milton's question: 'If all killing be not murder, nor all taking away from another, stealing, why must all untruths be lies?' Because, we say, killing and taking away of goods deal with rights which are not absolute and unlimited, but become in certain situations void; while an untruth turns, not on another's right, but on the exigency of the speaker's own rational nature calling for the concord of the word signifying with the thought signified, and this exigency never varies." (Rickaby, "Mor. Phil.," 2d Ed., p. 231.) So, with envy, blasphemy, idolatry. So, the killing of an innocent man directly willed and brought about

as a good in itself can never be right. The economic theory of law would sometimes justify killing the plague-stricken as a sanitary precaution. It might even in a famine justify Dean Swift's proposal to eat babies. Our law is based on higher principles, however; and in a famous English case it was decided that where shipwrecked sailors in a starving condition draw lots to decide who shall die in order that the rest may have food, it is a crime to kill him to whom the lot falls even though he is resigned to such a death. So, with duelling as defined to be, a meeting of two parties by private agreement to fight with weapons in themselves deadly. So, with suicide and other wrongful acts. These are some of the more evident precepts. Others are less readily recognized, and require more careful study to be grasped in their complete binding force; for instance, that which condemns such practices as "squeezing" innocent "shorts" after "cornering a market." Many of them are invaluable in the solution of practical questions, particularly those questions which have to do with the various extensions of governmental activity and supervision which tend, however remotely, towards socialism. Nowadays, when the Henry George economic sect is urging communism of land, when the industrial arbitration sect would have a strike by laborers made a crime and when the anti-trust sect wants confiscation of capital; when hanging criminals or even whipping them and all vivisection of animals by medical professors are said to be unalterably opposed to natural justice by people who have influence with legislatures, it is important to take a sensible view of society's rights as against you and me, and of our property rights and our other rights in society,—like the view, for example, which our judges are taking in setting aside dozens of misconceived anti-trust statutes; and it is very important for law-schools to aid in the scientific study of such matters.

Thus natural law embraces all the principles which have a necessary connection with moral rectitude and it proclaims the opposite of sheer wickedness or moral insubordination. As in other spheres of truth, so in morals, some principles are less evident than others, but we are endowed with reason, and ought not to expect the knowledge of all our nat-

ural duties to "come natural" in the sense that we should never need to consider them carefully. The natural law extends to all conclusions which are based on a consideration of the primary principles of doing good and shunning evil and which are thence deduced by our natural reason. The truth of these deduced principles is bound up with that of the primary ones, and He who framed the latter necessarily commanded whatever is consonant with and prohibited whatever is repugnant to the former. The commission of an act in ignorance of the full force of some of these principles, however, which would not have been committed had its author known better is often excusable, for although the action is wrongful in itself, yet he may be innocent in view of his state of knowledge and his use of judgment.

We now turn to a subject peculiarly depending on natural law, that, namely, of international law. There is no earthly government over nations to administer justice in case of disputes. There is neither a recognized court to decide such questions nor any power which could be relied on to enforce a court's decisions. Under these circumstances natural law is the only law that can be said to operate. It informs contending nations of such things as are either necessarily wrong or necessarily right for nations so situated to do, just as it would show two strangers meeting on an unclaimed island that their common human nature establishes certain rights and obligations which both must respect, and these constitute their natural relations towards each other.

Of course, if the two nations or the two men enter into various agreements or if certain customs have marked their intercourse, these agreements or customs become more minute regulators of their actions toward each other than the natural law by itself, but again the binding force of these agreements or customs arises from a principle in the natural law ordaining that we shall live up to our just engagements, so that economic interpreters of international law cannot get rid of the element of moral obligation by explaining the mutual fulfilment of obligations by nations on the sole ground of express agreement, custom growing into tacit agreement or public opinion. Since if the net result

of abiding by an agreement will be disagreeable to any nation, those who are at the head of it will disregard the agreement unless they feel a moral obligation not to do so. For the materialists, thereupon, to invoke public opinion of the desirability of abiding by agreements as a mere force making people keep faith with one another, is for them to invoke the star witness against their materialism, since public opinion at once points to that on which it is founded, namely, the common knowledge shared in by all nations at all times, that there exists a moral law of right and wrong above the consideration of earthly gain or loss, and that this law exerts a higher obligation and has a higher sanction. In the introduction of Vattel's "Law of Nations" one may read much that is interesting concerning the part natural law plays in international law.

In viewing these matters of international law the student of jurisprudence should inquire as to what are the natural relations of nations, and whether or not nations properly observe them and the agreements and customs which supplement them. In looking at the domestic laws of a nation or nations he may profitably ascertain (1), what the objective natural law is, as properly understood and as it should sway all; (2), with what force and in what different ways does it, as at present apprehended, affect (*a*) human lawgivers in the making of their laws and (*b*) the people in obeying them. Thus natural law is to be considered objectively as revealing natural suitability and unsuitability or moral right and wrong, and subjectively as moving the lawmaker and the people rationally or morally, or in both of these ways together, in accordance with their more or less firm apprehension of its precepts and adherence to them. We have taken a brief glance at its objective existence; we shall indicate below something of its subjective bearings and their importance. The study of its objective reality is the more valuable, especially for the ordinary law-student, since it reveals the essential determinants of what our rational, social human nature demands, and therefore the essential determinants of the subjective public opinion on these questions in so far as it conforms to objective truth. Thus it corrects the imperfections of public opinion, which studied by itself

shows a lack of unanimity on many questions and a general ignorance of the precise bounds of many principles which leads to error in complicated situations. Those who deny the existence of natural law sometimes declare that in dealing with these matters the lawmaker simply follows public opinion, and thus they seem to make him in this most important affair, what they would not make him in any other, a follower of opinions, not a guide who probes into the reasons of them. If there exists, however, as we believe, a necessary intrinsic suitability or unsuitability in many actions, it is worth the legislator's while to learn about it thoroughly. Entirely apart from the eternal sanction of the natural law, we know that it has a temporal sanction; that not to live as becomes our nature is to live irrationally and foolishly; and that nations as well as men pay the penalty of folly. We have spoken above of the moral order, but note that when, for instance, we designated certain actions as immoral, it has often been only inasmuch as immorality was necessarily bound up with a violation of the natural order, with which latter order we are more closely concerned. Thus wise legislators try to abate divorce evils and similar wrongs, not so much as being things immoral in the sense of being displeasing to God, but because the reason of their being immoral, their discordance with natural fitness should make them displeasing to anyone who considers human rules of action, although he were merely a rationalist. This constitutes a strong argument for the study of natural law in law-schools. The lawyer should be a practical sociologist; if he learns the fundamental principles of human society, observation and common sense will do the rest.

Looking now at positive law, we see that it is divided into divine and human positive law. We shall pass by the divine positive law, only recalling the instance of it before mentioned in the commandment to keep the seventh day holy. We instanced before, also, the human positive law that river vessels should display certain lights. We know that human legislators often re-ordain portions of the natural law, sanctioning their own commands with their own punishments. Thus murder, arson and theft are punished by hanging and imprisonment, and slander by making the

guilty person pay damages to the person slandered. The human lawgiver very frequently also commands or forbids the commission of acts which were before in themselves indifferent, as in the instance just given regarding river vessels or in the instance of a prohibition of the sale of intoxicants on election days. It is well known that even in the case of laws regarding these acts which are in themselves indifferent the moral wrongfulness of disobedience to lawful authority is an important element in securing obedience to the laws, and, in a higher degree, perhaps, the moral wrongfulness of committing any acts directly forbidden by natural law deters many from violating such human laws as forbid us to commit certain acts already forbidden by the natural law. The moral obligation with its eternal sanction is really necessary to the convenient government of states. The wisdom of studying and cultivating these fixed precepts of the natural law is, therefore, apparent, if only inasmuch as they manifest the necessity of the functions of the state and uphold its established authority. They are not friends of the state who would induce us to believe that there exists no such thing as a moral obligation to obey laws, and yet such a belief is the logical upshot of most materialistic doctrines. In the case of the precept of natural law enjoining submission to the state, as in the case of most others, the people have a firm but unscientific apprehension of the truth. The false doctrines should, nevertheless, be disproved scientifically and shown to be unnatural and immoral before they can be spread abroad.

Let us see more closely how natural law supports human positive laws. Human society is the natural outcome of human needs and desires, and progress in knowledge, which is natural to humanity, makes for closer social union. Since the interests of individuals are often opposed to those of the community as a whole; and since other communities also may have conflicting interests, a political head, whose function is to discover and obtain what is for the common good, is the natural result. The political head, the government, or a special department of it, is charged with the task of legislating. Many moral wrongs if allowed to

go unpunished by the state would at least endanger its existence, and the early lawmakers are usually much occupied with determining what part of the natural law should be enforced by human enactments and penalties, and thus is constituted most of what is called criminal law. But state legislation must in the nature of things go beyond natural law, which leaves undetermined thousands of matters which it is important to settle in order that conflicts may not arise. It is often indifferent how they are settled, but necessary to settle them in some way or other. Thus, if an article under sale perishes before delivery the loss falls, apart from contracts to the contrary, upon whichever of the two parties is the owner at the time. So far nature rules. But who is the owner at any given time, and at what stage of the transaction does dominion pass? That is settled by the law of the land, which is often modeled on the custom of such dealings. (Paley, "Mor. Phil.," Bk. 3, Cap. 7; Rickaby, "Mor. Phil.," 2d Ed., p. 359.)

A developing civilization requires more and more to be kept in order by a vast body of positive law. Without positive laws a multitude of property rights would be unprotected and even undetermined. The state by what is called its criminal law protects property against the open aggression of robbers; but, in order to secure to all the fruits of their labor, it must go further and define numerous open questions between possessors as to manner of acquirement and conditions of tenure, and between other contracting parties. Since then human laws are necessitated by the natural development of society, they are sanctioned by the natural law, and, therefore, by the Eternal Law and by God. They are not merely the exactions of those possessing physical might, and they must bind the conscience. Government without the power to coerce is helpless and the just coercion of rational beings presupposes the moral guilt of disobedience. If a law addressed to us is categorically imperative there remains, then, no doubt about its obligating us in conscience. If it seems the intention of the legislator not to bind us absolutely to perform the act required, and we do not in fact perform it, we are bound to perform the alternative; that is, to pay the penalty. For otherwise

the legislator would not have the right to inflict the penalty.

Moral obligation, then, is the direct and necessary effect of every true law. This conclusion may seem open to doubt in a case—the case, for example, of many corporation laws, where the law appears only to confer privileges, and does not in set terms prohibit or command anything. But let us recollect that right is correlative with obligation or, as the maxim runs, “One man’s obligations begin where another’s rights end.” So, in the case of laws dishabilitating certain persons from making legal contracts or providing that certain kinds of agreements shall be unenforceable, let us observe that these laws have regard to the enforcement of certain claims of parties litigant which the legislator directs shall be granted or refused, and in this manner he lays an obligation on the judiciary, who are bound within certain limits to give effect to legislative will. For instance, no obligation was imposed by the Statute of Frauds upon parties entering into contracts to comply with certain formalities, and frequently honest men waive objections which they might raise by reason of that law. The Statute of Frauds was a rule of action prescribed to judges, and the obligation thus imposed is by no means to be overlooked when one studies scientifically how laws bring about the results intended by the lawmakers.

When we prove in this way that every human law exerts a moral obligation on those who are called upon to observe it, we exhibit jurisprudence as something more than a general commentary on rules upheld by sovereign force. (Holland’s “Elements of Jurisprudence,” 8th Ed., pp. 25, 26.) For we show how its every precept relates back, as the divine positive law relates back, to the natural law and thence back to the Eternal Law. The bare outlines of this admirable system reveal at a glance the co-ordination and interdependence of laws as they are commanded by the Divine Lawgiver and by human lawgivers, and the sanction which parts of the natural law indirectly receive from temporal rulers as well as that which human laws receive from the Eternal Ruler.

But this does more than properly arrange and systematize the various kinds of law. It does more for the study of hu-

man law than suggest broad principles for dividing classes of questions and for studying and handling those which newly arise. It reveals as a constant and vital element the moral quality of certain actions which modern writers are prone to slight. Holland, for example, in his "Elements of Jurisprudence" (8th Ed., p. 26), announces that he will pass by, as foreign to his subject, the head of Ethics, "which has to do with the conformity of will to a rule," and confine himself to considering "the conformity of acts to a rule." He disregards the natural law, also. But the student of jurisprudence should not treat as foreign to his subject the rights and obligations natural to man as a rational and a social being which make it intrinsically suitable that human rules of law be arranged in this way or in that, and the knowledge of which is of vast weight with the lawmaker when the law is made, and with the people for whom it is made. When we remember that acts done in obedience to human laws depend on human will it is not going too far below the surface to consider in its outlines a constant and extremely important element in determining the act through the will. Taking an incomplete, unphilosophic view of the subject and mistaking it for a complete philosophic view leads to the error of explaining phenomena which the disregarded element largely influences, as being entirely due to other causes. John Stuart Mill correctly states that what secures obedience to many important laws is public opinion, the state often being unable to follow up its laws with force; and we know on what public opinion is founded. From the bringing of people into this world to their departure for the next world, the influence of the natural law is always to be felt, and it helps the human law at all points, especially where the latter is weak. This is notably true in the case of suicide—that bane of society against which human lawgivers bring their power to bear only preventively and therefore often ineffectively. In point of the physical force back of them all that they can forbid, as being all that they can sanction with punishment, is an unsuccessful attempt to commit suicide, for the one who succeeds in his frightful purpose is forever beyond their jurisdiction.

But the influence of the natural law on the people in pro-

curing submission to human enactments is not all. There is also its great influence with those who make human enactments, the lawgivers in helping them to discern and obliging them to provide what is good for the people. No form of government will work well unless the people are disposed to submit to law and their representatives or their monarch disposed to govern them well.

Human society is a plexus of relations, and each man is a unit whose properly enlightened mind and well-disposed will should bring about such a self-ordering towards other men as will make him a harmonious unit. Some men called lawmakers help arrange this plexus, and devise among other things punishments of various sorts; that is, disagreeable consequences which will follow upon the unit's refusal in important matters to harmonize himself with others. Natural law, we have seen, shows us the first principles of this harmony, and exerts a great influence in disposing legislators to add to it as far as they can and in disposing the people to observe it. Mutually fulfilled obligations are essential to it, but note that the sanction of the human lawgiver, the disagreeable consequences of disobedience which he devises, do not follow as a matter of physical necessity upon any unit's disobedience. It is all a matter of the relations of men, of free moral agents, towards each other, and the most that directly happens to enforce the lawmaker's will is that other units are obligated to visit the offender with the disagreeable consequences. If they do not so visit him, may it not be that the lawmaker has so arranged it that disagreeable consequences will fall upon them for their disregard of obligation? No, at the most simply that other units are obligated to visit these offenders with disagreeable consequences—and so, go back as far as we will, we shall find that no physical force is raised up at the lawmaker's behest, and that in the last analysis, no matter how cunningly he may devise it, by setting off one functionary or unit against another, yet the plexus is held together in many places only by some unit's belief in right and wrong, by his knowledge of the natural law and his abiding by it.

Thus our judiciary, on whom rests the interpretation of our laws, need usually little fear temporal coercion or pun-

ishment if they disregard the obligation imposed on them by the legislative will, and render the decision prompted by their private economy. The fact of the immense influence with most men of their understanding that something is naturally suitable and right or unsuitable and wrong, which fact makes the clear, scientific demonstration of such matters through the study of the natural law so potent and effective, is seen in the struggles which the judiciary, whose members as a rule have been much more enlightened and true to conviction than men generally, have waged against the tyranny formerly of monarchs and latterly of various sorts of socialists, who have grasped at other people's property through unjust income tax, corporation tax, anti-trust and other so-called laws. But judges have found ways to uphold the principles of natural justice, formerly by invoking those principles directly under the doctrines of *epiikia*, *æquitas*, equity, etc., and chiefly, when the need arises under our system of government by applying the principles of the Federal or State constitution, which are often very properly interpreted and even extended to prevent the sanctioning of injustice and inequality under a government in whose first principles it was sought to confirm the just and equable principles of the natural law. And we know that our laws are safe in the hands of our judges, for, although they are often free to settle momentous questions one way or another at their pleasure, and although they often might at such times enrich themselves at the expense of doing injustice, they have, nevertheless, been well content to heed the obligations of their moral nature and to take counsel of the precepts of the natural law, in order that our legal system may be amplified and expanded in harmony with those precepts to suit the growing requirements of society. Such men toil patiently all their years to adorn and to build grander and yet grander the Temple of Justice, whose architecture is, as we have seen, like that of some old European cathedrals, strangely composite, but which fills us the more with awe from that very fact, suggesting as it does the common needs and aspirations of alien races and ages, and the co-operation of men from generation to generation in the work of the Most High.

John J. Sullivan.

ACTIONS BY TRUSTEES IN BANKRUPTCY.

Prior to the decision of the Supreme Court of the United States in *Bardes v. Bank*, 2 N. B. N. Rep. 725, (1900), that District Courts have no jurisdiction in actions by trustees "except by the consent of the proposed defendant," the weight of authority in the lower Federal Courts was in favor of such jurisdiction. The Court of last resort in so deciding did not overlook *Ex parte Christy*, 3 How. 292, (1845) and the other cases holding that Congress could not confer exclusive jurisdiction upon State Courts in such actions, but nevertheless relegated the trustee to the State Courts.

Claffin v. Houseman, 93 U. S. 130, (1876), decides that State Courts *may* exercise jurisdiction in such cases, but neither that nor any other authority holds that they *must*. "Not that Congress could confer jurisdiction upon the State Courts but that these courts *might* exercise jurisdiction in cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the Federal Courts."

It was doubtless pointed out in the argument of the *Bardes* case that the denial of the jurisdiction of the District Court must necessarily render the Bankruptcy Act of July 1, 1898, not only less useful than the Acts of 1841 and 1867, but practically inoperative so far as its anti-preferential features were concerned.

If the State Courts refuse to entertain suits to set aside preferences, how can the Act be carried into effect?

In *Fry v. Trust Co.*, 195 Pa. 343, (1900), the jurisdiction of the State Court was not questioned, the Supreme Court of Pennsylvania merely affirming an order refusing to give to an assignee in bankruptcy a judgment for want of a sufficient affidavit of defence.

It may be fancied that the point is merely of academic interest, but the question has in fact already arisen. In *Lyon, trustee, v. Clark*, 2 N. B. N. Rep. 792, (1900), the

Supreme Court of Michigan has ruled that the courts of that state must not entertain jurisdiction of actions by trustees to reach property transferred contrary to the provisions of the Bankruptcy Act, holding it "more consistent with the dignity and independence of the state tribunals to decline to take jurisdiction in cases arising under that act—if such jurisdiction theoretically existed—rather than expose themselves to collisions and conflicts with the United States Courts, or subject their proceedings to the control of those courts in attempting to adjudicate them."

This was and is the settled law of Michigan: *Voorhis v. Frisbie*, 25 Mich. 476, (1872); *Sheldon v. Rounds*, 40 Mich. 425, (1879); *McMaster v. Cambell*, 41 Mich. 513, (1879), which it would seem that the Supreme Court of the United States is powerless to change. Decisions elsewhere are to the same effect: *Gilbert v. Priest*, 65 Barb. 444; *Brigham v. Claflin*, 31 Wis. 607; *Bromley v. Goodrich*, 40 Wis. 131.

In *Copp v. L. & N. R. R. Co.*, 43 La. Ann. 511, (1891), state jurisdiction of a suit under the Interstate Commerce Act for unlawful discrimination is denied. *Battin v. Kear*, 2 Phila. 301, (Sharswood, J.), and *Dudley v. Mayhew*, 3 N. Y. 9 (1849), (both decided before the jurisdiction of the Federal Courts in patent cases was expressly made exclusive) hold that as the rights of the patentee spring wholly from the Federal Statutes, (Act of Congress, July 4, 1836, § 17), the State Courts would not take jurisdiction.

Missouri River Telegraph Co. v. First National Bank, 74 Ill. 217, (1874), denied jurisdiction of an action against a national bank to recover penalties for exacting usury.

In *Newell v. National Bank*, 12 Bush 57, (1876), usury was pleaded and an attempt made to set off the forfeiture declared by the Act of Congress, but the State Court refused to enforce the penalty.

In an interesting and exhaustive note to *Loughlin v. McCaulley*, 48 L. R. A. 33, (186 Pa. 517, 1898), the general subject of the "Administration of Federal laws in State Courts" is ably discussed, and it is shown that the great weight of authority is in favor of concurrent jurisdiction, unless the State Courts are expressly excluded by Act of

Congress. Among the Pennsylvania cases are: *Bletz v. Bank*, 87 Pa. 87, (1878); *Bank v. Gruber*, 91 Pa. 377, (1879); *Bank v. Karmany*, 98 Pa. 65, (1881). But no intimation can anywhere be found of a power reserved to *compel* State Courts to take jurisdiction, much less to compel them to take *exclusive* jurisdiction against their will. This would seem to be clearly beyond the power of Congress. So that it may be strongly urged that, as construed in *Bardes v. Bank*, the Act of 1898 is either not "uniform," or it is an unconstitutional infringement upon the rights of the states.

It would appear to flow from this that if the Bankruptcy Law is to persist as a "uniform" system, an amendment is called for, or the *Bardes* case must be reconsidered. In this rather surprising situation, growing out of our dual form of government, it may be of interest to notice some of the constructions of the Act of 1898, which would lead to a more happy issue.

Pursuant to the plenary powers granted to Congress by the Constitution of the United States "to establish uniform laws on the subject of bankruptcy throughout the United States" to which "power there is no limitation":¹ and which "may be exercised with the same latitude as the like power has been or may be by the British Parliament:"² the Act of July 1, 1898, was passed, investing the District Courts, *inter alia*, (§2) "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings to" . . . "(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for a complete determination of a matter in controversy:" "(7) cause the estates of bankrupts to be collected and distributed, and determine controversies in relation thereto, except as herein provided:" . . . "(18) tax costs, whenever they are allowed by law, and render judgment therefor against the unsuccessful party or the successful party for cause, or in part against each of the parties, and against estates in proceedings in bankruptcy; . . . Nothing in this section contained shall be construed to deprive a Court of

¹*In re Irvine*, 1 Pa. L. J. 291, (Baldwin, J.).

²*Kuntzler v. Kohaus*, 5 Hill 317, (Cowen, J.).

Bankruptcy of any power it would possess were certain specific powers not therein enumerated," this broad and extensive delegation of power being qualified only by § 25 b., which provides that "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

At least three interpretations favorable to Federal jurisdiction have been ably advanced by excellent authorities. These may be briefly noticed :

I. THAT JURISDICTION WAS CONFERRED AND WAS NOT TAKEN AWAY BY SECTION 23 b., BECAUSE THAT SECTION LIKE SECTIONS 23 a AND 23 c, REFER ONLY TO THE JURISDICTION OF THE *Circuit* COURTS.

This reasonable theory was first advanced by Judge Adams,³ and has been followed in four cases.⁴

Judge Adams said, (91 Fed., page 372) : "A trustee appointed under the Bankrupt Act although an officer created by an Act of Congress is not by reason of that fact alone, as in the case of a receiver appointed to wind up the affairs of a National Bank, entitled to resort to the Circuit Courts of the United States for the enforcement of his rights as such officer, but must stand in the shoes of the bankrupt himself with respect to instituting suits in the Circuit Courts of the United States. In other words, Section 23, when properly construed, seems to me to mean that so much of the Act of March 3, 1887, and August 13, 1888, as confers jurisdiction upon the Circuit Courts of the United States of a suit in favor of an officer holding title under a law of the United States is inoperative with respect to the officer known as a trustee under the Bankrupt Act. Subdivision (a) is in the nature of a prohibition addressed to the United States Circuit Courts from exercising jurisdiction in any case between the trustee and an adverse

³*In re* Sievers, 91 Fed. 366, (1899).

⁴*In re* Newbury, 97 Fed. 24, (Severens, J.). *Trust Co. v. Marx*, 98 Fed. (456), (Evans, J.). *In re* Murphy, 2 N. B. N. R. 393. *Cox v. Wall*, 2 N. B. N. R. 572, (Ewart, J.).

claimant, unless the bankrupt himself could have resorted to the Circuit Court for the assertion of such claim against the adverse claimant. Subdivision (b) reinforces the prohibition of subdivision (a), but in this instance the prohibition is addressed to the trustee instead of the Circuit Court as found in subdivision (a). Both subdivisions when read together in my opinion, relate to the same subject matter, and that is to the jurisdiction of the United States Circuit Courts and to that alone. They limit the jurisdictions of such courts to hear and determine such actions only between a trustee and an adverse claimant, as a bankrupt himself might have prosecuted against such claimants in those courts because of diverse citizenship, and require a trustee when asserting a claim through the right of title of a bankrupt to resort to a State Court unless the bankrupt might have resorted to a Federal Court. This section, taken as a whole, appears to me to be only a curtailment of the jurisdiction of the Circuit Court and not at all applicable to District Courts or their jurisdiction as already in the act conferred upon them. This is more manifest when it is considered that District Courts, as such, are not mentioned in the section, while the Circuit Courts are in terms alone referred to in subdivisions (a) and (c). Subdivision (b) is found located immediately between subdivisions (a) and (c) and in the same act conferring a broad and comprehensive jurisdiction upon the District Courts as Court of Bankruptcy. Now applying two familiar rules of construction of statutes; one of which is condensed in the maxim '*noscitur a sociis*' and the other requiring the Courts to so construe any act as to give force and effect to each and all of its parts, I am disposed to hold that subdivision (b) relates to the same subject matter as that found in the immediately preceding and following subdivisions namely, to the jurisdiction of the Circuit Courts of the United States and particularly to the matter of providing a remedy which is there taken from such courts, and that this subdivision finds full scope for application in such places in which the District Court is in full charge of the given cause, because of the fact that the debtor or adverse claimant resides without the territorial limits of the juris-

diction, cannot afford a remedy, and in which the Circuit Courts might have had jurisdiction except for the provisions of Section 23. In such cases the State Courts have exclusive jurisdiction unless there is such diversity of citizenship as permits recourse to the Circuit Courts. It may be that a trustee by virtue of subdivision (b) under consideration may at his election resort to any State Court as a court of competent jurisdiction in any case for a remedy, but as to this I am not called upon to express an opinion. I am, however, clearly of the opinion that subdivision (b) does not exclude a resort to this Court in any proceeding by the trustee arising within its territorial jurisdiction."

2. THAT JURISDICTION WAS CONFERRED AND WAS NOT TAKEN AWAY IN CASES OF FRAUDULENT OR PREFERENTIAL TRANSFERS, BECAUSE THESE SUITS ARE NOT SUCH AS "THE BANKRUPT . . . MIGHT HAVE BROUGHT."

To Judge Brown of the Southern District of New York⁵ belongs the honor of first having announced the distinction between ordinary rights of action formerly belonging to the bankrupt, and those rights of action which are peculiarly the creatures of the act. This may be said to be the most popular construction enunciated prior to the *Bardes* case.⁶

It is well stated by Judge Baker in *Carter v. Hobbs*:⁷ "It seems to me to be clear that where the trustee brings a suit to enforce a right of action which never existed in the bankrupt, the District Court has ample jurisdiction to maintain it. The trustee's right of action in such a case is not a derivative one, growing out of a prior right possessed by the bankrupt, but his right is original, created by law, and in the enforcement of it he represents the creditors, and his

⁵*In re Gutwillig*, 90 Fed. 481.

⁶*In re Brooks*, 91 Fed. 509, (Wheeler, J.). *Carter v. Hobbs*, 92 Fed. 595, (Baker, J.). *In re Crystal Spring Co.*, 96 Fed. 945. *Murray v. Beal*, 97 Fed. 569, (Marshall, J.). *Lowell on Bankruptcy*, 412. *In re Murphy*, 2 N. B. News 393. *Pepperdine v. Headley*, 98 Fed. 863, (Phillips, J.). *In re Connolly*, 2 N. B. N. R. 557, (E. F. Hoffman, Esq., Referee).

⁷92 Fed. 595.

suit is in effect the exact equivalent of a creditor's bill to reach property fraudulently transferred."

3. THAT JURISDICTION WAS CONFERRED, AND THAT SECTION 23, RELATING MERELY TO VENDUE, PREVENTED SUIT IN ANY DISTRICT OF WHICH THE DEFENDANT WAS NOT AN INHABITANT "UNLESS BY CONSENT OF THE PROPOSED DEFENDANT."

Perhaps the ablest plea in favor of jurisdiction was by Judge Amidon of North Dakota,⁸ whose opinion is well worthy of careful perusal. Judge Baker, by independent processes, afterwards reaches the same conclusion.⁹

Jurisdiction of the subject matter cannot be conferred by "consent" though jurisdiction of the parties may,¹⁰ and hence it is strongly urged that the only effect of Section 23 (*b*) is to prevent any suit except in the circuit of which the defendant is an inhabitant, unless by his "consent"¹¹

Judge Amidon, after summing up the difficulties in the case,¹² concludes: "We will now endeavor to find a construction of the Bankruptcy Act which will harmonize its different provisions. The solution of the whole difficulty is indicated by the last phrase of subdivision 'b' of Section 23.—'unless by consent of the proposed defendant.' Those courts which have denied jurisdiction have entirely passed over this clause. It certainly renders impossible their construction of the balance of the subdivision. If the limitation which the statute imposes may be set aside by consent of the defendant, then it must relate to a matter wholly subject to his discretion. But according to the interpretation of those courts that deny jurisdiction, it relates to the jurisdiction of the subject matter. It is elementary, however, that juris-

⁸*In re* Woodbury, 98 Fed. 833.

⁹*Shutts v. Bank*, 2 N. B. N. & R. 320.

¹⁰As to the meaning of "consent:" see *In re* Connolly, 57 Leg. Int. 164, (Apl. 20, 1900, McPherson, D. J.), 9 Dist. Rep. 217.

¹¹*Shepard v. Graves*, 14 How. 505. *Wickliffe v. Owings*, 17 How. 47. *Evans v. Gee*, 11 Pet. 80. *Hartzog v. Memory*, 116 U. S. 588.

¹²*In re* Woodbury, 98 Fed. 833, (1900). (See also *Hall v. Kincell*, 2 N. B. N. R. 745, where the U. S. Circuit Court of Appeals for the Ninth Circuit (Gilbert, Ross and Morrow, Circuit Judges) quotes with approval from Judge Amidon's opinion.)

diction of courts as respects the subject matter cannot be left to the discretion of the parties. That jurisdiction must be created and defined by law, and if it does not exist the action of the Court is nullity, notwithstanding the most solemn stipulation of the litigants. My conclusion, therefore, is that subdivision 'b' does not relate to jurisdiction of courts, but to the venue of suits. Under the Federal statutes in force at the time the bankrupt law was passed, a defendant, with certain exceptions not now important, could not be sued in a district of which he was an inhabitant; and in case the district was divided into divisions he could not be sued except in the division of which he was a resident. The object of subdivision 'b' was to apply this restriction specifically to suits brought by trustees under the Bankruptcy Act but that act furnishes still more direct cause for the limitation. Under Section 45 the trustee need not be a resident or citizen of a district in which the proceeding is pending; he need not maintain an office in the district. It would frequently occur that a majority of the creditors, especially in the case of insolvent merchants, would be residents of a district other than that of the bankrupt. Take for example the states of Wisconsin, Iowa, Indiana and Michigan. It might easily happen that a majority of the creditors of a bankrupt in either of these states would consist of the wholesale dealers at Chicago; and such creditors might naturally prefer to place a trustee from their own community, with whom they are personally acquainted, in control of the bankrupt's estate. If this should occur, it would be possible for such a trustee to sue any debtor of the estate from either of the states named, in the district of Illinois if he should be found there; for it is well established that when one sues in a representative capacity, it is his own, and not the residence or citizenship of the person represented that fixes the venue and jurisdiction of Federal Courts: *Coal Co. v. Blatchford*, 11 Wall 172, 20 L. Ed. 179. It was this possible hardship that Congress had in mind when it adopted the language contained in subdivision 'b.' But these statutes forbidding the suing of a defendant in a district of which he is not an inhabitant, or a division of which he is not a resident, creates only a personal

privilege, which the defendants may waive, and which he does waive unless he makes timely objection. *Improvement Co. v. Gibney*, 160 U. S. 217, 16 Sup. Court 272, 40 L. Ed. 401. It was to give force to this rule that the last phrase of subdivision 'b' was employed—'unless by consent of the proposed defendant.' In the light of these considerations the words in subdivision 'b' 'in the courts where' should be given their obvious sense as relating to venue, and not be construed as meaning 'in the courts which would possess jurisdiction.' Giving to subdivision 'b' this construction brings all the provisions of the bankruptcy act on the subject into harmony, and also harmonizes the Act of 1898 with previous statutes of the same character as they have been interpreted by the highest Federal Courts."

Some of the general considerations in favor of jurisdiction may be thus summarized:

1. Jurisdiction undoubtedly existed under the Acts of 1841¹³ and 1869¹⁴ notwithstanding less explicit grants thereof.

2. Congress has not the constitutional power to give State Courts exclusive jurisdiction.¹⁵

3. The power of a Court of Equity, having once taken jurisdiction of a rem, to fully adjudicate all questions relating thereto as in the analogous case of receiverships.¹⁶

4. The express power to appoint receivers for the preservation of estates (§2) in whom is vested, by operation of law the title to the property transferred in fraud of creditors, (§70).

¹³*Ex parte Christy*, 3 Howard 312. *Mitchell v. Manfg. Co.*, Fed. Cases 662.

¹⁴*Sherman v. Bingham*, Fed. Cases 12762. *Goodall v. Tuttle*, Fed. Cases 5533, (1872). *Lathrop v. Drake*, 91 U. S. 516, (1875).

¹⁵*Martin v. Hunter*, 14 U. S. 304, 330. *Houston v. Moore*, 18 U. S. 1, 27. *Robertson v. Baldwin*, 165 U. S. 275, (1896). *McLean v. Bank*, Fed. Cases 8885, (McLean, J.). *Sterns v. U. S.* Fed. Cases 13341. 1 Kent. Comm. 399, 400. 2 Story Const., (3rd Ed.), §§ 1752-1755.

¹⁶*Murray v. Beal*, 97 Fed. 568, (1899). *Porter v. Sabin*, 149 U. S. 473. *White v. Ewing*, 159 U. S. 36.

5. These canons of construction are involved:

(a) An exception must be strictly construed.

(b) A remedial statute is to be liberally expounded.

(c) Apparently conflicting clauses must, if possible, be so interpreted as to give effect to both.

(d) The absurdity of first granting plenary jurisdiction and then withdrawing it in the same act.

(e) Section 23 "a" would be entirely nugatory because Section 23 "b" applies to all courts.

6. "Congress did not intend to trust the working of the bankrupt system solely to the State Courts of twenty-six states."¹⁷

Judge Lowell has contributed an exhaustive opinion to the literature of the subject,¹⁸ where the cases are collected.

Ira Jewell Williams.

August, 1900.

¹⁷*Ex parte Christy*, 3 How. 312.

¹⁸*In re Hammond*, 98 Fed. 845.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

BANKRUPTCY.

As the trustee in bankruptcy is subject to the orders of the court, it might seem that a person would not be allowed to refuse to serve merely on the ground that there are no assets from which his fees could be paid. However *In re Levy*, 101 Fed. 247, decides that where the bankrupt files the affidavit that he has no means and is unable to pay even the preliminary costs, the court has no power to require a person to serve as trustee unless the creditors furnish his advance fee or otherwise arrange with him.

In *In re Hoadley*, 101 Fed. 233, the bankrupt was a devisee under will of his father, whereby the latter left his property to his wife for life, remainder to the children of testator who should then be living, in equal shares, the issue of a deceased child taking their parent's share. The District Court (S. D. N. Y.) held that under the law of New York the estates of the children of the testator were contingent until the death of the widow, therefore no interest passed to the trustee in bankruptcy of one of them who became bankrupt prior to that time.

The District Court (E. D. N. Y.) has decided that an action for breach of promise of marriage, followed by the seduction of the plaintiff, is an action of contract and within the terms of the bankruptcy act, therefore a judgment in such an action is discharged by the discharge of the judgment debtor in bankruptcy: *In re McCauley*, 101 Fed. 223.

CARRIERS.

In *Lewis v. Chesapeake Rwy. Co.*, 35 S. E. 908, the defendant railroad received goods for consignment to a steamship company, the bill of lading providing that defendant's liability should cease upon delivery "to the steamship company or on the steamship pier at the port." The goods were delivered upon a pier owned and controlled by the railroad company, but which the steamship company was permitted to use, and were there

CARRIERS (Continued).

destroyed by fire. The Court of Appeals of West Virginia held (1) that the bill of lading contemplated a delivery upon a wharf of the steamship company and not upon one of the railroad, and (2) that even if the latter construction were intended, it would be void as an unreasonable attempt of the carrier to escape the duty of delivery.

CONSTITUTIONAL LAW.

Under the fourteenth amendment it is one of the "privileges" of a citizen of the United States to make use of the flag of the United States as an advertisement for selling goods, and a state statute forbidding such an use of the flag deprives him of his property without due process of law. So the Supreme Court of Illinois decides in *Rushstrat v. People*, 57 N. E. 41, holding that the police power is not broad enough to cover cases of mere "sentiment." Cartwright, C. J., and Wilkin and Carter, J J., dissented, and, though no dissenting opinions appear, we imagine that a very strong one could be written.

It was formerly held that although a state could not tax an agency of the federal government, yet the United States could tax at pleasure the agency of a state. However, since the case of *U. S. v. B. & O. R. R.*, 17 Wall. 322, the rule has been different, and it is now held that the taxing power of the United States is limited to the same extent as that of the states. But, in *U. S. v. Owens*, 100 Fed. 70, Judge Adams, of the Circuit Court (E. D. Mo.), carries the doctrine of state exemption a little too far in holding that the United States has no power to impose a stamp tax on a bond given by a saloon keeper, who has received a license, for the proper conduct of his business. The opinion proceeds upon the ground that the granting of the license, in return for the bond, constitutes a contract between the licensee and the state, which is clearly wrong. The judge says that since the United States could not tax the license, it cannot tax the bond. Granting that no tax could be imposed upon the license, the conclusion arrived at does not follow by any means.

It is well settled that the constitutional provision in regard to public trials is to be interpreted in a reasonable manner and does not deprive courts of a certain amount of discretion in regard to the conduct of cases. *People v. Hall*, 64 N. Y. Suppl. 433, applies this principle to a statute passed to carry out the constitutional

CONSTITUTIONAL LAW (Continued).

mandate. The New York Civil Code (§ 5) provides that the sittings of every court shall be public and every citizen may freely attend the same, except that in trials and actions on certain named subjects the trial judge shall have authority to exclude all but interested persons. The Supreme Court of New York held that even where the trial involved a subject not mentioned in the exception of the statute, the court had authority to exclude from the court-room the spectators probably drawn there by desire to hear the loathsome details of the case

While the legislature may require that notice of intention to bring an action against a municipal corporation must be given within a specified time after the accrual of the cause of action, yet such requirement of notice must be reasonable. So where it was provided in a village charter that no action for personal injuries against the village could be brought unless the plaintiff gave notice to the village of his intention to sue, which notice must be received within forty-eight hours after the accident, the Supreme Court of New York held the provision void, as depriving the plaintiff of a property right under the fourteenth amendment to the constitution of the United States: *Green v. Village of Port Jarvis*, 64 N. Y. Suppl. 547.

CONTRACTS.

Ever since the case of *Williams v. Carwardine*, 4 B. & Ad. 621, it has been a mooted question whether or not, when a reward is offered for certain information, the information must be given with the express purpose of obtaining the reward, in order to constitute a binding contract. *Vitty v. Eley*, 64 N. Y. Suppl. 397, holds that, under the New York rule, (1) the information must be given with the knowledge of the reward, and (2) it must be given for the express purpose of obtaining the reward, so that (3) the reward is not earned by the informer if the information is extorted from him by threats of arrest.

Henry v. Rowell, 64 N. Y. Suppl. 488, is a questionable decision of the Supreme Court of New York, which should be appealed. In 1872 A. and B. entered into a contract whereby A. promised to board and lodge B. for the rest of her life, in consideration for which B. promised to leave all her property by will to A. B. boarded with A. until 1884, when she left A. without cause

CONTRACTS (Continued).

and did not return to the end of her life, in 1898, when it appeared that she had not left A. all her property. In an action by A. against the estate, it was held that the only breach of contract occurred in 1884, when B. repudiated it, and not in 1898, therefore A.'s cause of action was barred by the statute of limitations.

CORPORATIONS.

In *Johnson Co. v. Chamber of Commerce*, 82 N. W. 795, the Supreme Court of Michigan discusses the nature of the power given by the charter of a corporation to the directors to assess annual dues against the stockholders. It was held (1) that such a power authorizes assessments only for the incidental expenses of the corporation and not for the purpose of paying its general indebtedness, and (2) where the directors have assessed and collected the dues for a certain year, a corporate creditor cannot maintain a creditor's bill to compel the directors to levy an extra assessment.

Where an electric corporation receives permission from a city to erect poles and wires, which it maintains for a number of years, the city is estopped from alleging that the act under which the corporation was incorporated gave it no power to conduct such a business and that the franchise conferred upon it by the city was void: *Electric Co. v. Wyandotte*, 82 N. W. (Mich.), 821.

The Illinois courts follow consistently the doctrine of the Supreme Court of the United States that an *ultra vires* contract is absolutely void, and no amount of acceptance of benefits by the corporation will render it liable on such a contract. The latest Illinois case on the subject is *Best Brewing Company v. Klassen*, 57 N. E. 20, where a brewing company became surety upon an appeal bond of a liquor dealer, a clearly *ultra vires* act. The Supreme Court of Illinois decided that the fact that the effect of the bond, in enabling the dealer to continue his business and thus purchase the brewing company's beer,—even if such facts would constitute a benefit in the eye of the law,—did not estop the company from pleading the invalidity of the contract. Of course this rule does not apply where the contract is *intra vires*, but merely irregular: *Brewing Co. v. Flannery*, 137 Ill. 309.

CRIMINAL LAW.

In *State v. Hill*, 35 S. E. 831, the Court of Appeals of West Virginia reversed a conviction for burglary upon a seemingly immaterial point. The indictment alleged that the goods were stolen from a car of the "Pittsburg, Cincinnati, Chicago and St. Louis Railroad Company, in the custody of the Baltimore and Ohio Railroad Company." On trial it appeared that the car belonged to the "Pittsburg, Cleveland, Chicago and St. Louis Railroad Company," which was in the custody of the Baltimore and Ohio Railroad Company. It was held that the variance was fatal, even though the court admitted that it was unnecessary to specify the actual owner of the car in the indictment, since the car was both alleged and proved to have been in the custody of the Baltimore and Ohio Railroad Company, which special ownership would have been sufficient to support conviction under the indictment. The decision seems to violate the general modern rule that variance in an immaterial point is not fatal.

Under the Indiana decisions it would seem that where a bartender illegally sells liquor on Sunday in violation of the express orders of the proprietor of the saloon, and without the knowledge of the latter, the proprietor is not guilty of a criminal offence: *Rosenbaum v. State*, 57 N. E. 156.

COURTS.

The general jurisdiction of the federal courts over actions for penalties and forfeitures is vested in the District Courts. The United States Statute (§ 629, R. S.) gives the Circuit Courts jurisdiction of "all suits at law or equity arising under the patent and copyright laws." It having been decided that a suit to recover the penalty of one dollar for having possession of each copy of an infringed photograph, was a penal one (*Brady v. Daly*, 20 Sup. Ct. 64), the question arose whether such suit should be brought in the District or the Circuit Court: *Falk v. Curtis Pub. Co.*, 100 Fed. 77. Judge Dallas, of the Circuit Court (E. D. Penna.) while remarking that the point had never been decided directly, held that the Circuit Court could properly hear the case, although the jurisdiction in such cases was probably concurrent.

DAMAGES.

In *Kraemer v. Met. Street Rwy. Co.*, 64 N. Y. Suppl. 618, the plaintiff sustained injuries to her knees, whereby she expended

DAMAGES (Continued).

**Excessive
Damages** \$1,600 on physicians and nurses, was unable to walk for eighteen months after the accident and would probably never be able to walk any great distance or up and down stairs without suffering considerable pain. The Supreme Court of New York held that a verdict of \$15,000 was excessive and ordered a new trial conditioned upon the plaintiff's refusal of a judgment for \$7,000, together with the amount of the actual expenses.

DEEDS AND MORTGAGES.

The doctrine of incorporation by reference has grown up as a part of the law of wills, but there is no reason why it should not apply equally to the case of other instruments in writing. Thus a Connecticut Statute (§ 3016) provides that certain chattels may be mortgaged by a deed containing "a particular description of such personal property, executed, acknowledged and recorded as mortgages of land." In *Surety Co. v. Cycle Co.*, 100 Fed. 40, the mortgage itself did not contain a description of the chattels, but referred to a schedule which was annexed and recorded at the same time. The schedule itself was not subscribed or acknowledged. The Circuit Court (D. Conn.), very properly held that the application of the doctrine of incorporation by reference caused the schedule to become part of the mortgage, so as to render it valid under the statute.

EVIDENCE.

In *Comm. v. Reagan*, 56 N. E. 577, Hammond, J., of the Supreme Court of Massachusetts gives an interesting discussion of the respective duties of the court and jury in regard to the competency of witnesses. The principal point decided was that when a witness is objected to on the ground of his youth, the question of his competency is for the judge alone. The court then discussed the case of the offer of a confession, which is objected to on the ground that it is involuntary; saying that it is the duty of the court to decide in the first instance, even where the testimony is conflicting. In Pennsylvania it would seem that it is a question wholly for the jury. See *Comm. v. Epps*, 193 Pa. 512.

INSURANCE.

In *Cannon v. Phoenix Ins. Co.*, 35 S. E. 775, the Supreme Court of Georgia discussed the liability of an insurance com-

INSURANCE (Continued).

"Friendly" pany for a "friendly" fire as opposed to its liability
 and for an "hostile" fire. In that case policy insured
 "Hostile" against "direct loss and damage by fire," and the
 Fires damage complained of was caused by a stovepipe
 which refused to work, flooding the rooms with soot, and
 heating the woodwork so that water had to be used to cool it.
Held, that since the only fire in question was contained in its
 proper place, the stove, the damage to the building was not
 caused by an hostile fire within the meaning of the policy.

The medical examiner of an insurance company has no
 power to waive non-compliance with the terms of the policy.

Waiver. Thus in *Desmond v. Benevolent Legion*, 64 N. Y.
Authority of Suppl. 406, the applicant stated to the medical
Officers examiner that he had never applied for insurance
 in that association before, and his answers were warranted to
 be true in his application ; whereupon the examiner passed him,
 and the policy was issued. It appeared that several years before
 the applicant had applied for insurance in the association and
 had been rejected by the same medical examiner, who had
 made a note of the rejection in his books. The Supreme
 Court of New York decided that even if the medical examiner
 was chargeable with knowledge of the former application, his
 action could not be construed as a waiver, since it was beyond
 the scope of his authority.

In contrast to the above case may be cited *Allison v. Steven-*
son, 64 N. Y. Suppl. 481, decided by the same court at the
 same term, to the effect that where a by-law of the association
 provides that the insured may designate the beneficiary by
 filing with the association a writing duly signed and ac-
 knowledged as a will ; and a paper, not acknowledged, is filed
 with the treasurer of the association, by whom it is retained
 without objection until the death of the insured, the associa-
 tion is deemed to have waived compliance with the by-law.

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TREASURER.

REMEDIES OF A WRONGFULLY DISCHARGED EMPLOYEE.

CONTRACT—RES ADJUDICATA—JUDGMENT A BAR TO SECOND
SUIT UPON SAME CAUSE OF ACTION.—*Allen v. Colliery Engineers*
Co., 46 Atl. R. (Pa.) 899, (1900). A few cases may with advantage
be added to the interesting note (39 Am. Law Reg. N. S., 428)
upon *Alie v. Nadeau*, 44 Atl. 891, (1899), holding that a wrongfully
discharged employee may bring only one action. *Alie v. Nadeau* is
not only not the law of Pennsylvania, but is contrary to the weight
of authority. The Supreme Court of Pennsylvania, in an opinion
handed down by Mr. Justice Fell, on July 11, 1900 (after the July
issue of this magazine went to print), decided that where a servant
whose wages are payable periodically is wrongfully discharged he
may maintain separate actions for each installment of salary: *Allen*

v. Colliery Engineers Company, 46 Atlantic Reporter, 899, (1900), the Court said:

"The generally recognized rule is that an employe for a fixed period who has been wrongfully discharged may either treat the contract as existing and sue for his salary as it becomes due, not on a *quantum meruit*, but by virtue of the special contract, his readiness to serve being considered equivalent to actual service, or he may sue for the breach of contract at once or at the end of the contract period, but for the breach he can have but one action; 2 Smith's Leading Cases, note to *Cutter v. Powell*, 7 Am. Law Reg. (N. S.), 148, note to *Huntington v. R. R. Co.* Our cases are in entire harmony with this rule. In *Algeo v. Algeo*, 10 S. & R, 235, it was held that where the performance of the services had been prevented by the discharge of the employe, he must declare on the special agreement and could not recover on the implied promise, as the law would infer the promise from the acts of the plaintiff only and not from the acts of prevention by the defendant. In *Clay Telephone Co. v. Root*, 17 W. N. C., 200, the plaintiff sued during the contract period on an agreement which, as in this case, was severable because the consideration was apportioned. In the opinion in *Kirk v. Hartman*, 63 Pa. 97, it was said by Sharswood J., that a servant dismissed without cause before the expiration of a definite period of employment could maintain an action of debt on the special agreement.

"It follows that if the recovery in the New York Court was for the installments of salary then due, as alleged in the declaration in this case, the plaintiff may maintain his action; if it was for damages for breach of the contract as averred in the plea filed, he is concluded by it."

This decision of course supersedes *Eisenhower v. School District*, 13 Pa. Superior Court, 57, (February 16, 1900), in which a precisely opposite conclusion was reached by the Superior Court of Pennsylvania.

Allen v. Colliery Engineers Company is supported by the great weight of authority.

"It is not a matter of doubt that when a contract is made for personal services, for a particular term, at stipulated wages, if the party employed is, without cause, discharged during the term . . . he is not compelled to accept the breach of his employer as a termination of the contract. . . . If the wages are payable by installments, he may sue for and recover each installment as it becomes due." *Strauss v. Meertief*, 64 Ala. 299, (1879); *Liddell v. Chidester*, 84 Ala. 508, (1887).

"The salary being payable weekly, she could, at any time, sue for all due her at the time of commencing suit, without barring her right to afterward sue for and recover salary subsequently becoming due." *McEvoy v. Bock*, 37 Minn. 402, (1887).

Where wages are payable weekly or monthly, each installment gives rise to a separate cause of action: *Britton v. Turner*, 6 N. H. 481, (1834); *Whitaker v. Sandifer*, 1 Duvall (Ky.) 261, (1864);

Armfield v. Nash, 31 Miss. 361, (1856); *Blun v. Sterne*, 53 Ga. 82, (1874); *Badger v. Titcomb*, 15 Pick 409, (1834).

Where money is payable by installments, a distinct cause of action arises upon the falling due of each installment, and they may be recovered in successive actions; nor will a recovery for one such installment bar an action for another which falls due after the commencement of the first action: *Hamm v. Beaver*, 31 Pa. 58, (1857); *Armfield v. Nash*, 31 Miss. 361, (1856); *Priest v. Deaver*, 22 Mo. App. 276, (1886); *Weiler v. Henarie* (Oreg.), 13 Pac. Rep. 614, (1887).

Alie v. Nadeau assumes that a contract of employment, with wages payable in installments, is indivisible; in fact, counsel in that case seem to have so admitted. But that very question is the vital point in the case. When the consideration is expressly or impliedly apportioned, the contract is not entire but *severable*, and successive actions lie: *Lucesco Oil Co. v. Brewer*, 66 Pa. 355, (1870); *Rugg v. Moore*, 110 Pa. 236, (1885); *Gill v. Lumber Co.*, 151 Pa. 534, (1892); *McLaughlin v. Hess*, 164 Pa. 570, (1894).

The maxim "*nemo debet vexari si constet curiæ quod si pro una et eadem causa*" can therefore have no application, for there are, in fact and in law, several distinct and separate causes of action for the various installments of salary as they fall due. Of course, as pointed out by Mr. Justice Fell, the discharged employe may, if he so elect, "sue for the breach of contract at once or at the end of the period," [See *Wilke v. Harrison*, 166 Pa. 202, (1895)], but possibly the wiser plan would be to sue for salary as salary, after it has in fact accrued, and not compel the jury to guess as to the plaintiff's probable earnings during the remainder of the term. "An employe for a determinate period, if improperly dismissed before the term of service has expired, is *prima facie* entitled to recover the stipulated compensation for the whole term": *Kirk v. Hartman*, 63 Pa. 107, (1869); *King v. Steiren*, 44 Pa. 105, (1862).

"Subject . . . to a reduction by the amount of what he has earned, or might have earned, in the meantime by other employment": Note to *Huntington v. R. R. Co.*, 7 Law Reg. (N. S. 148), 1867.

Although evidence of plaintiff's earnings elsewhere is technically matter for affirmative defence, as a matter of practice it is as well to frankly prove, while the plaintiff is on the stand, his diligent efforts to secure other employment, and the amount earned therein.

Ira Jewell Williams.

August, 1900.

BOOK REVIEWS.

BANKS AND BANKING. BY JOHN M. ZANE: T. H. Flood & Co., Chicago. 1900.

This work, we can safely assert, is more than a restatement of the law of banking. It is a very thorough treatise upon the theory underlying that law. The author is a forceful and original thinker; and, while he admits that not all his doctrines are in accord with authority, they are well defended in the text. He shows a decided tendency to cling to the common law, and it is upon that basis that he thinks the solution of the undesirable inconsistencies in our law rests. At one place he remarks: "It is the idea of bailment which, properly carried out, will render banking law symmetrical and uniform the world over."

The author strenuously upholds the United States rule that the holder of a check cannot sue the bank for failure to pay (§ 147). He devotes a whole section to the refutation of the arguments of Daniel and of Morse, who hold, with the Illinois and other State Courts, the opposite view.

The view of Morse is that it is the duty of the bank, if it have unencumbered funds to the amount of the check, to pay; i. e., there is a quasi-contract between the holder and the bank. Again, he argues that presentment works an actual assignment of the fund. Finally, he says there is a contract between the bank and the depositor that the former will pay any one whom the latter orders it to pay (Morse, *Banks and Banking*, § 499).

Zane's answer to the first contention is that the weight of authority shows that there is no customary duty upon the part of the bank to pay the holder of the check, which could give rise to an action founded on quasi-contract. He disagrees entirely with the second ground. To the last he replies that there is no contract, expressed or implied, from the circumstances of the deposit in favor of the holder. He says the duty of the bank to pay whomsoever the depositor directs is enforceable by the depositor, not upon the grounds of contract, but of quasi-contract. Again, even if there were such a contract, there is no privity between the bank and the holder.

We do not believe that the author's contention that there is only a quasi-contract between the bank and the depositor, is tenable. There is clearly a benefit derived by the bank from the use of the money, and, in return for this, it promises to pay to whomsoever the depositor directs. Here we have all the essentials of a contract.

The author frequently, in his book, calls things quasi-contracts that are usually considered implied or expressed contracts. For instance (§ 62) he maintains that the obligation of a stockholder to pay an assessment of one hundred per cent on his stock is not a contract created by his subscription for stock, but a quasi-contract

arising from the customary duty of stockholders to answer for the debts of an insolvent corporation. This question has just been argued in the case of *Woodworth v. Bowles*, 60 Pac. (Kas.), 331, 1900, where the question of the impairment of the obligation of contract hinged on the point whether the stockholder's liability arose in contract or quasi-contract. The court held that it was clearly a contract.

To return to the question of a bank's duties to the holder of a check, it seems that the lack of privity between the holder and the bank does, under the weight of authority, deprive the former of his action. Daniel (*Negotiable Instrum.* § 1638), attempts to supply this lacking element on the theory, that by the act of presentment, priority is created. It does not seem that this doctrine has yet been adopted.

We cannot approve of the author's caustic criticism of the Illinois Court. They are certainly not to be despised for holding an opinion adopted by two such eminent writers as Morse and Daniel. It is true that uniformity is desirable in our banking law; but we cannot expect a court to decide in favor of that to which they cannot agree. That we should have these discordant opinions is one of the disadvantages of our political system, which are more than offset by its advantages. Furthermore, the objection to the Illinois rule is purely a technical one, and, if the banking interests of this country should in the future demand a different rule in this respect, should not stand in the way of the alteration.

The author, throughout the work, seems very much dissatisfied with the banking law of Illinois. This state comes in for more adverse criticism than any other. The author is a member of the Chicago bar, and it may be that this fact leads him to see more defects in the law of that state than in that of others.

The value of the work is much increased by the appendix which contains all the Federal laws in relation to National Banks. The work, while containing the legal discussions to which we have referred, still commends itself to the practical banker. We can recommend it to all our readers.

E. W. K.

THE CIVIL LAW IN SPAIN AND SPANISH AMERICA, INCLUDING CUBA, PUERTO RICO, AND PHILIPPINE ISLANDS, ETC. By C. S. WALTON, Washington, D. C. W. H. Lowdermilk & Co. 1900.

Undoubtedly the question of most general interest to Americans, be they publicists or private persons, is at the present time concerning our new rights and duties growing out of the acquisition of territory from Spain in consequence of the late war. Whether we regard the acquirement of any or all of our new island possessions as a stupendous blunder, or whether we regard it as simply a fulfillment of our national destiny, or whether we take the middle ground—and probably the true one—that it was neither an unbounded blessing

nor an unmixed misfortune, the subject is of peculiar interest. By consequence, therefore, anything bearing even remotely on this topic is interesting and it is to lawyers especially that Mr. Walton's book will appeal. It is not our purpose here to enter into an elaborate discussion of this valuable work, since space forbids. Suffice it to say that the book contains, besides an elaborate historical introduction and a translation of the Spanish Civil Code of 1889 (extended to Cuba, Puerto Rico and the Philippines), much supplementary matter of importance as well as the Spanish, Mexican, Cuban and Puerto Rican autonomical constitutions. Mr. Walton would seem peculiarly fitted for this work, being a Doctor of the University of Madrid, *Licenciate* (Bachelor) of the University of Havana and member of the bar of the District of Columbia and of that of the Supreme Court.

Passing by the historical introduction, which is exceedingly interesting as an illumination of comparative jurisprudence, we come to this statement on page 112: "If the conflicting differences between the local and common law, peculiar to Spain and which have little force in Cuba, Puerto Rico, and the Philippines, are eliminated from the Spanish Civil Code, and a few amendments in harmony with United States institutions are substituted for the provisions which relate to monarchical institutions, there would result, in the opinions of those familiar with the subject, a most excellent code suitable for the people of Puerto Rico and the Philippines." This is also the opinion of former Judge Howe, of Louisiana, writing in the *Yale Law Journal* for July. Manifestly such an arrangement would be advantageous even though the laws are not indigenous to the islands, if only because it would avoid the confusion which would necessarily ensue upon introducing our own common law in its entirety into them. It is to be noted, however, that neither our author nor Mr. Howe advocates the retention of the criminal code.

We are sure that Mr. Walton's book will be welcomed by students of law everywhere, involving as it does much new and hitherto generally inaccessible matter, and containing the fruits of much laborious research.

E. B. S., Jr.

THE AMERICAN LAW OF REPLEVIN AND KINDRED ACTIONS.
By ROSWELL SHINN, LL. D. Illinois College of Law, Chicago:
T. H. Flood & Co. 1899.

Probably no book on this subject shows traces of greater industry and research than this work by Professor Shinn. Not content with a statement of the common law principles of replevin and the statutory modifications generally followed throughout the United States, the author makes in many instances a detailed analysis of the peculiarities of statute and code provisions. His aim throughout is to present in a comprehensive way the whole body of American adjudications bearing on this important remedy. The experience derived in the production of his "American Law of Attachment

and Garnishment" was evidently of great assistance to him in collecting and arranging the materials embodied in this later publication. It is a book of large size, and contains three general divisions: 1. The Remedy, including a description of its nature, the parties thereto, and the property subject to it. 2. The Procedure, being an extensive treatment of the practice. 3. Actions arising from replevin, including the liability of sureties on either party's bond, review of replevin, action against the officer serving the writ, etc. It is entirely free from theoretical discussion and consists in great part of concise statements of points taken from a vast number of cases, each point being referred to by paragraph at the chapter heading, and in the body of the chapter emphasized by heavy type. This, in addition to a compendious index, makes it a valuable reference work. The author has wisely avoided the repetitions frequently incident to a treatise of this character by making many cross-references. He has also used the alphabetical order of arrangement. Thus, in considering the persons by and against whom the action may be sustained, he begins with the acceptor of a bill of exchange, and takes up in order administrator, assignee, attachment creditor, and all the legal relations which give the rights and impose the liabilities of the action. The same principle is applied in discussing the various kinds of personal property reached by replevin.

In opening his chapter on "The Proceedings" the author says, "It is my purpose to show the adjudication of the courts upon the different statutory requirements, as well as the requirements of the common law, and thereby to indicate, not only to the local practitioner, but to the general lawyer, the present state of the adjudications upon any particular statutory requirement, in whatever state or states such requirement may now be, or may have heretofore been enforced." Then follows a voluminous note in which the jurisdictional requirements as to the form and substance of the affidavit is given with encyclopedic completeness.

While in parts the book bears an analogy to a digest of cases, it possesses merit as a text-book for the student as well as for the practicing lawyer. It is written in a lucid and scholarly style. The general principles underlying the action of replevin are frequently restated to insure a thorough understanding of their application to new facts and legal relations. The history of the action is carefully traced from its original, crude and limited form in the old English law to its modern statutory development. Present-day differences between the English and American doctrine are pointed out. The author has not blindly followed the cases, but has made pointed criticisms where peculiar state decisions demanded criticism.

F. K. S.

BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked * will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, S. W. Cor. Thirty-fourth and Chestnut Streets, Philadelphia, Pa.]

A SELECTION OF CASES ON CONSTITUTIONAL LAW. By EMLIN MC-LAIN. Boston: Little, Brown & Co. 1900.

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THE OLD TREATY AND THE NEW.

A waterway to unite the Atlantic and Pacific Oceans comes within those agencies to "abridge distances," which Macaulay said, "barring the alphabet and the printing press had done most to further the progress of humanity." The war with Spain and its resultants have emphasized the importance, if not the necessity, of this waterway to the United States, and caused a strong popular demand for its speedy construction.

For good or evil the United States have become a maritime nation. The possession of Hawaii and the Philippines has precipitated the country into the struggle of the Powers of the Pacific. Gathering Hawaii into the federal fold launched the United States into the Pacific arena; the acquisition of the Philippines committed the country to an international policy "at the gateways of the day."

An Isthmian canal, therefore, is sharply challenging solution. It may be accepted as one of the certainties, and by no means remote, of the future. It would remove, as it were, a whole continent out of the way of ships steaming to the Southern Pacific Ocean. Triumphs of this kind over

the obstacles which nature interposes to the intercourse of mankind may be regarded as a victory of peace greater than which in the present day can bring renown to us from war.

The question that blocks immediate action is: By whom and under what conditions shall it be constructed? Before answering this, it would seem that the Clayton-Bulwer treaty must be dealt with. But regardless of party division, and by an almost unanimous vote, the House of Representatives has passed a bill that is manifestly intended to be an abrogation of the Clayton-Bulwer treaty, and a disapproval of the Hay-Pauncefote treaty now pending before the Senate. The friends of the latter treaty, having negotiated to establish a *modus vivendi* between the United States and Great Britain as to the provisions of the Clayton-Bulwer treaty, were driven by the action of the House of Representatives to secure an extension of time for its ratification to seven months beyond the date fixed in the protocol. This will cover the session of Congress beginning in December, when it is expected the Senate will take some definite action. A recurrence to certain historic facts may be of some value.

Long previous to the war between the United States and Mexico, England in a treaty of peace with Spain obtained permission to cut logwood and mahogany in the Balize Settlement, dividing Nicaragua and Honduras from the Mexican state of Yucatan, and which at that time belonged to Spain. Taking advantage of this privilege England founded a settlement at the Balize, enlarging and extending from time to time its boundaries, and assuming rights of soil and dominion. About the same time she also claimed to have made a treaty with a small tribe of Indians, called the Mosquitos, upon the coast of Central America, and to have guaranteed to them the protection of the British Government. This Mosquito country was within the chartered limits of Nicaragua.

This was the status of affairs when the Mexican war was brought to a close. It was understood that Great Britain had used her powers of diplomacy to defeat any treaty of peace by which the United States would acquire any Mexican territory. On the day that it became known at Vera Cruz that a treaty of peace had been signed, by which Cali-

fornia and New Mexico were transferred to the United States, the British fleet set sail from Vera Cruz and proceeded directly to the mouth of the San Juan River, in Central America, and took possession of the town of San Juan at the mouth of the river, changed its name to Greytown, and established British authority there, in the name of the Mosquito King, to be exercised by the British consul; in fact converted it into a British dependency. The United States promptly protested against this act, as showing hostile motives toward the United States, and having for its object to close up the only channel through which they could establish and maintain communication between the Atlantic States and the newly-acquired possessions on the Pacific.

The controversy growing out of this seizure of that transit route led to the Clayton-Bulwer treaty. However, it should be stated, that during the last years of Mr. Polk's administration he had appointed Elijah Hise, of Kentucky, Minister to the Central American States; and Judge Hise in June, 1849, without having directions to do so, negotiated a treaty on behalf of the United States with Nicaragua, known as the Hise-Selva treaty, by which the United States were invested with "exclusive right and privilege" to construct a ship canal or railway through the territory of Nicaragua, including the river San Juan, between the Atlantic and Pacific Oceans. This treaty contained a number of provisions, such as stipulations for the construction of forts and military works upon the banks of the San Juan for the protection of the proposed passage, and to exclude the vessels of any Power with which either of the contracting parties (United States and Nicaragua) might be at war.

This treaty did not reach the United States until after the inauguration of General Taylor as President, and the appointment of Mr. Clayton as Secretary of State. Mr. Clayton refused to accept the treaty, and in his objections laid special stress upon the article under which the United States guaranteed to Nicaragua forever the whole of her territory, and promised to become a party to every defensive war in which that state might thereafter be engaged for the protection of her territory. In lieu of the Hise-Selva treaty, Mr. Clayton proposed to Sir Henry Bulwer, the British

Minister at Washington, that the British Government should unite with the United States in proposing another treaty to Nicaragua, by which no exclusive advantage should be conferred on any party.

The Clayton-Bulwer treaty was the result of the movement made by Mr. Clayton, and must have met with very general approval, for its ratification by the Senate was resisted by only eight negative votes. This treaty bears date April 19, 1850. The preamble states that the two countries are "desirous of consolidating the relations of amity which so happily subsist between them, by setting forth their views and intentions with reference to any means of communication by ship canal which may be constructed between the Atlantic and Pacific Oceans by the way of the river San Juan de Nicaragua, and either or both of the lakes of Nicaragua or Manangua, to any port or place on the Pacific Ocean."

By the first article it is agreed that neither contracting party shall ever obtain for itself any exclusive control over any ship canal, nor erect or maintain fortifications in its vicinity, or "occupy, fortify or colonize Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America, or assume or exercise dominion over the same; nor will either take advantage of any intimacy, or use any alliance, connection or influence that either may possess, with any state or government through whose territory said canal may pass, for the purpose of acquiring or holding, directly or indirectly, for the citizens or subjects of the one any rights or advantages in regard to commerce or navigation through the said canal which shall not be offered on the same terms to the citizens or subjects of the other."

By the fifth article both Powers engage to protect the canal from interruption, seizure, or unjust confiscation, and to guarantee its neutrality, conditionally upon the management of the canal not making any unfair discrimination in favor of one or the other of the contracting parties.

By the eighth article—in order "to establish a general principle"—the provisions of the treaty are extended to any practicable canal or railway across any part of the Isthmus, and therefore covered both Tehuantepec and Panama.

This treaty has produced, perhaps, more discussion and has been the occasion of more ill-feeling than any other treaty we have with a foreign government. Between 1850, the year of its ratification, and 1860 it opened up a host of questions between the contracting parties; and a mass of diplomatic correspondence was exchanged in reference to Great Britain not carrying out the requirements of the treaty, in retaining control over certain Central American territory, Great Britain contending that the treaty was wholly prospective, the prohibitions applying only to future acquisitions, and that she could maintain all her then possessions.

The United States, while conceding that the language admitted of a double construction, insisted that in view of their having no territory in Central America and Great Britain having a great deal, it was unjust and unfair to expect the United States to be put at such a disadvantage as the claim of Great Britain involved. The attitude of the United States was so firmly maintained and vigorously pressed that Great Britain finally yielded all such territorial claims; and in 1860 President Buchanan made the statement that there had been an amicable adjustment, Great Britain having by treaty with Honduras and Nicaragua relinquished the Mosquito protectorate, and given up to Honduras the Bay Islands. Congress expressed no dissent to the President's declaration that "the dangerous questions arising from the Clayton-Bulwer treaty have been amicably settled." The President's message in 1860 committed the United States to a formal acknowledgment that this treaty was an obligatory convention, and that it had been fairly and satisfactorily executed by Great Britain.

Since 1860 this treaty has been in some way recognized by our government in each of the succeeding administrations as a subsisting compact. In 1872 Secretary Fish, being advised of contemplated aggressions by Great Britain on Guatemala, instructed our Minister at London to protest and demand that the Clayton-Bulwer treaty should be observed, and every Central American state must be let alone. In 1880 the treaty was invoked by Secretary Evarts against an alleged attempt of Great Britain to acquire the Bay Islands.

Secretary Blaine criticised the treaty and said it ought to be revised, but he recognized that it was in existence and in force when he expressed the hope that Great Britain would "concede certain modifications," the rest of the treaty "to remain in full force." Secretary Olney in 1895 recognized it in a dispatch to Mr. Bayard, then United States Minister at London, saying: "We are indebted to the Monroe doctrine for the provisions of the Clayton-Bulwer treaty, which both neutralized any interoceanic canal across Central America and expressly excluded Great Britain from occupying or exercising any dominion over any part of Central America." In his message of December, 1885, President Cleveland declared: "Whatever highway may be constructed across the barrier dividing the two greatest maritime areas of the world must be for the world's benefit, a trust for mankind, to be removed from the chance of domination by any single Power, and must not become a point of invitation for hostilities or a prize for warlike ambition.

. . . The lapse of years has abundantly confirmed the wisdom and foresight of those earlier administrations which, long before the conditions of maritime intercourse were changed and enlarged by the progress of the age, proclaimed the vital need of interoceanic transit across the American isthmus, and consecrated it in advance to the common use of mankind by positive declarations and through the formal obligation of treaties." And this treaty has been recognized by Secretary Hay; it is true that the Hay-Pauncefote amendatory treaty has not been confirmed, but its submission is a direct acknowledgment that the Clayton-Bulwer treaty is in force. Secretary Frelinghuysen is the only Secretary of State who ever made an argument to show that the treaty was void, or rather "voidable." No responsible official in this country has ever claimed that it is actually void; a few merely claiming that it should be amended, or at worst, is voidable. Our government, whenever its infraction has been threatened, has always treated it as full of life, and not having fallen into "innocuous desuetude" from old age. Four different times we have held England to the stipulation that she would assume no control over territory in Central America, and twice we have turned a deaf ear to the in-

formation "that Her Majesty's government would not decline the consideration of a proposal for the abrogation of the treaty by mutual consent." The Clayton-Bulwer treaty was made at our solicitation. It was not obtained by foul means, or by false statements, or to do an unlawful act. There had been ample time for consideration of all the facts, opinions and theories. It was negotiated after mature deliberation, the result of mutual self-abnegation and friendly co-operation to compass an end distinctly utilitarian and humanitarian. It was a convention envired with happy auspices and good intentions, and in pursuance of a long established and often-proclaimed policy. It is a good thing still to regard it as in force. It is of decided value, an instrument made to our hands. It is a bulwark of defence, a contract to be enforced, not surrendered. The only possible reason we could have to do away with it is because we seek to do things we there renounce; in short, to assume the aggressive ourselves, to prefer belligerent to neutral rights, and to launch forth into the troubled sea of foreign politics. Secretary Blaine, though criticising the engagements of the treaty as "imperfectly comprehended and contradictorily interpreted," was constrained to admit: "I am more than ever struck with the elastic character of the Clayton-Bulwer treaty and the admirable purpose it has served as an ultimate recourse on the part of either government to check apprehended designs in Central America on the part of the other."

It provides not only for the extension to Central America of our own historical policy, called the Monroe doctrine, but also for the free use of the canal by all nations. Throughout the entire history of this country's attitude toward a Central American canal, one common feature runs through all the treaties; and that is, whatever canal is built shall be neutralized; that is, exempted in some way from all the operations of war. The idea of neutrality and common use of the canal by all nations was entertained long before the Clayton-Bulwer treaty. It was proclaimed in a resolution passed by the Senate in 1835 and again by a resolution of the House of Representatives in 1839; both looking to the practicability of a canal across the Isthmus, and "to secure by suitable treaty stipulations the free and equal right of

navigating such canal by all nations." Therefore the neutrality provision of the Clayton-Bulwer treaty was no novel idea, but an old idea accepted and concurred in as good, expedient and wise. When the question was raised of the use of the Suez Canal by Great Britain in time of war, she intimated that the neutrality of such an avenue of commerce in time of war could best be maintained by the Power that could assemble the strongest fleet at either end of it. So in our late Spanish war Spain's war vessels were allowed to pass through it, and our own might have gone if they had chosen to do so.

It seems to be the opinion of the best international lawyers of both countries that the Clayton-Bulwer treaty is in full force and effect, and that it cannot be legally got rid of except by mutual consent. If the Hay-Pauncefote treaty, now before the Senate, fails of ratification, any legislation for the building of an Isthmian canal must rest upon an abrogation of the Clayton-Bulwer treaty, whether so declared *eo nomine* or not. The United States cannot take exclusive control of an interoceanic canal in Nicaragua, unless we reach a convention with Great Britain to that effect, or trample under foot the Clayton-Bulwer treaty. The restriction as to the exclusive control of the canal imposed in this treaty, Great Britain agrees in the Hay-Pauncefote treaty, shall continue to bind her, while the United States is released from it. The value of this concession should be estimated as a great consideration for anything we may yield, if we, indeed, yield anything by the proposed modification. The House of Representatives has practically said in the Hepburn bill, No! to the ratification of this amendatory treaty. There must be no adherence to the neutralization of the canal. The whole question must be regarded as strictly and solely as an American question, to be dealt with and decided by the American government. The canal must be built, owned, controlled absolutely by the United States, without suggestion, interference or limitation on the part of any other government on earth. If the old treaty stands in the way, our rank as a "great power," the glorious result of the Spanish war, entitles us to look with contempt upon such a trifling obstacle. A canal American-for-the-Americans with exclusive control

and the right to fortify we want and will have, regardless of any compact to the contrary ; for "we've got the ships, we've got the men, we've got the money too."

Is this a good way to end a treaty between two powerful and friendly nations, unless trouble is expressly expected? "A treaty is a compact or agreement entered into by sovereign states for the purpose of increasing, modifying or defining their mutual duties and obligations." A treaty is not at an end because it becomes onerous or burdensome to one of the parties. No mere inequality of advantage can invalidate it. The modern treaty does not contain the *clausula rebus sic stantibus* by which it might be construed as abrogated when material circumstances on which it rested changed. It is a contract between two nations ; no one party can annul it at his will. If no stipulated period be designated and no right to terminate upon due notice retained, then it may be terminated only by the mutual agreement of the signatory parties. At a conference of the Signatory Powers to the Treaty of Paris, to consider an apprehended attempt by Russia to overthrow it, the following declaration was put forward : "It is an essential principle of the law of nations that no Power can liberate itself from the engagement of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement." There are certain well-known causes that writers on international law recognize as *per se* abrogating a treaty ; when either of the contracting parties loses its existence as an independent state, or where the internal constitution of either is so changed as to render the treaty inapplicable, or in case of war between the contracting parties.

When a treaty is violated by one party, the other can demand redress or can still require its observance. The Supreme Court in the case of *Whitney v. Robertson*, 124 U. S. 194, said : "A treaty is primarily a contract between two or more independent nations and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other." Of course any nation that is strong enough can abrogate a treaty, but a wanton abrogation is a just cause of war ; and it rests with the physical power of the na-

tion whether or not the abrogation will be good in point of fact.

By the constitution of the United States a treaty is placed on the same footing and made of like obligation with an act of legislation. Both are declared by that instrument to be the supreme law of the land; supreme over the constitution and laws of the particular states, and, like a subsequent law of the United States, over pre-existing laws of the same. It is within the power of Congress to pass subsequent laws qualifying, altering, or wholly annulling a treaty. For as Congress possesses the sole right of declaring war, and as the arbitrary alteration or abrogation of a treaty tends to produce it, this power may be regarded as an incident to that of declaring war. The exercise of such a right may be rendered necessary to the public welfare and safety, by measures of the party with whom the treaty was made, contrary to its spirit, or in open violation of its letter; and on such grounds alone can this right be reconciled either with the provisions of the constitution or with the principles of public law. The inviolability of a treaty, even when not especially guaranteed, is the first law of nations. Obligations created by a treaty are of the most sacred character; they are even more solemn and sacred than the obligations of private contracts, on account of the greater interests involved, of the deliberateness with which the obligations are assumed, of the permanence and generality of the obligations, and of "each nation's calling, under God, to be a teacher of right to all within and without its borders."

The public faith of a nation pledged in a treaty has its sanction and basis in that system of morals which underlies our civilization and our institutions. To wantonly disregard or violate such a pledge is utterly subversive of all international morality, utterly destructive of all the moral force by which alone the welfare of nations in their mutual intercourse can be secured.

There being no municipal tribunal before which international good faith may be enforced, the relations and mutual pretensions of nations, in consequence of the growth of international trade and the collision of international interests, are being constantly subjected to a more and more trying

ordeal. Diplomats, publicists and statesmen bear testimony to the urgent necessity of the substitution of reason for force, the efficacy of law in its ethical character over violent expedients, as the only permanent and safe factors in the adjustment of the contingent circumstances which arise and disturb the community of nations.

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CHANGE OF SOVEREIGNTY OF A PEOPLE AND THE UNITED STATES CONSTITUTION.

History does not furnish us with a well defined precedent where a nation, in case of conquest or acquisition of foreign territory, has ever succeeded in abolishing the laws and customs of a people brought under its dominion.

Pilate surrendered Christ to the Sanhedrim because He had offended only against the Jewish authorities. Upon the overthrow of the Roman Empire by the Northern barbarians, Theoderic, the enlightened king of the Ostrogoths, proclaimed: "that other kings had made their conquests at the ruination of the conquered peoples; that he, on the contrary, only desired that the Romans might congratulate themselves on the benefits of his dominion." His government was marked by a few radical changes in existing institutions and by that humane and considerate policy which was observed by the Visigoths upon their entrance in Spain, in permitting the inhabitants to continue in the exercise of their own laws and customs while the conquerors practiced the unwritten laws and observances of the Goths.¹ William the Conqueror upon his invasion of the British Isles was not able to extinguish Anglo-Saxon ideas of rights and justice; and the Moors occupied the Iberian Peninsula nearly eight centuries and, although their sway affected legislation,² they left it Spanish. Warren Hasting's Plan of 1772 for the government of British India continued Mohammedan Law in force; Austria has seen good reasons for not attempting to make changes in Hungary; while it is surprising to find how Spanish everything is even to-day throughout Latin-America.

And so it would seem that upon the broad and general grounds "*of the eternal fitness of things*," aside from the political and legal aspects of the case, the United States of

¹ Walton's Civil Law in Spain and Spanish-America, pp. 39-43.

² Walton's Civil Law in Spain and Spanish-America, p. 63.

America should not *ex abrupto* force its Constitution as a whole with its far reaching results, nice distinctions and discriminations, many of which are peculiar to the common law, upon a civil law people who are strangers to Anglo-Saxon legislation and customs and who will require at least a generation in which to understand and to be able to differentiate the two systems.

The maintenance and extension of our national dominion is a political and not a judicial problem, notwithstanding the existing evil, if evil it be, of too much judge-made law. The President and Congress are vested with all the responsibility and powers of the government for the determination of questions as to the maintenance and extension of our national dominion. It is not the province of the courts to participate in the discussion or decision of these questions, for they are of a political nature and not judicial. Congress and the President having assumed jurisdiction and sovereignty . . . all the people and the courts of the country are bound by such governmental acts.³

Questions also incident to acquisition and preliminary to government, whether the territory be contiguous or remote, whether our tenure be temporary or permanent, whether we keep, lease, sell or grant independence; these are all political matters intrusted without appeal to the discretion of Congress.⁴ The act transferring a country from one sovereignty to a new one transfers the allegiance of its inhabitants. They, however, do not participate in political powers, nor can they share in the powers of the (new) general government, until they become a state.⁵

It is a well recognized principle of international law that the cession of sovereignty over a country by one nation to another affects only the political relations of the inhabitants of the ceded country, and makes them subjects thereafter of the nation receiving the cession; that while the inhabitants of the ceded territory change their allegiance, their relations to each other and their rights of property remain undis-

³ 50 Fed. Rep. 110.

⁴ 14 Pet. 538; 9 How. 242; 18 Wall. 320; 101 U. S. 133.

⁵ Story on the Const., Sec. 1234; 1 Pet. 542; Halleck's Int. Law, p. 380 (Baker's ed.); 2 Whart. Dig. Int. Law, p. 425.

turbed.⁶ Laws, usages and municipal regulations in force at the time of cession remain in force until changed by the new sovereignty. The new sovereign may deal with the inhabitants and give them what law it pleases, unless restrained by the treaty of cession but until alteration be made, the former law continues.⁷

By the recent treaty with Spain sovereignty is ceded to the United States over Puerto Rico and the Philippine Islands with the following proviso: "The civil and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress." The ceding power imposes no conditions and reserves no rights defined and secured by the Federal Constitution to the inhabitants of these new possessions.

None of our territories have ever been organized under the Constitution but are creatures exclusively of the legislative department of the government and subject to its supervision and control,⁸ and in a territory all the functions of government are within the legislative jurisdiction of Congress;⁹ consequently, it is for Congress to decide what the political status of residents of our new possessions shall be; whether they shall exercise the rights of suffrage or not, and that right, if granted, may be limited or extended at the will of Congress.

The late treaty with Spain is distinguished from all others heretofore made by the United States in the acquisition of new territory. It is provided in the treaty of 1803 for the cession of Louisiana that: "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of the citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

* Vattel, Book 3, Chap. 13; 1 Pet. 511; 7 Pet. 51; 9 Pet. 711; 12 Pet. 410.

⁷ 9 Pet. 711; 16 How. 164.

⁸ 9 How. 242.

⁹ 86 Fed. Rep. 459.

The treaty of 1819 by which Florida was ceded to the United States contains a similar provision in Article VII. The administration of Mr. Monroe, expressly, by unanimous cabinet decision, and each House of Congress, impliedly and without division, decided that no part of the Constitution and no act of Congress applied to a territory unless extended to it by Congress. The question arose by Judge Fromentin issuing a writ of *habeas corpus* to have the body of ex-Governor Callava (then imprisoned by the order of General Jackson) brought before him, claiming the right to do so under the Constitution and under the laws of Congress vesting United States judges with that power. Governor Jackson denied the power and dealt militarily with the judge for issuing the writ, telling him that no part of the Constitution had been extended to the Floridas, nor any act of Congress authorized him to issue the writ. The case was brought before the President and Congress with the above stated result.¹⁰

The act for the temporary government of Florida was not an isolated instance in the history of our territorial legislation: it but copied in almost the exact words the first act for the establishment of a temporary government in Louisiana. The "liberty, property and religion," the free enjoyment of which was guaranteed to the inhabitants of the territories by these acts, were subject to the despotic authority exercised by the American Governor, as the successor of the Spanish captain-general, and this despotic government in Florida actually lasted four years. Senator Benton states that: "Two different administrations and two different Congresses, at the distance of sixteen years apart, governed two acquisitions of new territory exactly alike, and as incompatibly with our Constitution as a Spanish regal despotism is incompatible with our free republican government."

The treaties by which New Mexico, Utah, California were acquired in 1848 and 1853, embrace provisions similar to the Florida treaty (Articles VIII, IX, and V).

The treaty of 1867 by which Alaska was acquired has no provision for the incorporation of the Territory into the

¹⁰ Benton's Examination of the Dred Scott Case, pp. 4, 73.

Union as a state or states. It divides the inhabitants into two classes, and provides that they may return to Russia within three years, and in respect to those who do not return states: "But if they should prefer to remain in the ceded territory, they, with the exception of the uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes shall be subject to such regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."

The Constitution and Federal laws have not been made operative in Alaska, and only such statutes have been extended to it as circumstances warranted. It is an organized territory, governed directly from Washington. Physically it is foreign, its nearest point being 400, and its farthest 2,400 miles from Seattle. The Aleutian Islands extend even into the geographical limits of another continent. For thirty-two years a few judicial and executive, but no legislative, functions of government have been conferred upon the inhabitants. It is unquestionably within the constitutional power of Congress to withhold from the inhabitants of Alaska the power to legislate and make laws.¹¹

In every treaty by which the United States has acquired inhabited territory, prior to the Paris treaty with Spain, the ceding power has inserted a provision that the inhabitants, except uncivilized tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and all, except that by which Alaska was acquired, contain the further provision that they shall in due time, to be determined by Congress, be admitted as a state or states into the Union. In the absence of treaty provisions, it, therefore, appears that the Constitution, with the exception of the Thirteenth Amendment, does not *ex proprio vigore* extend itself over the newly acquired territories.

Colonies are territories settled by citizens of the sovereign

¹¹ U. S. Rev. Stat., Sec. 1954; 29 Fed. Rep. 205.

or parent state who left their native land to people another and to remain subject to the mother country. Puerto Rico and the Philippines already densely populated afford little opportunities for American colonization, and, therefore, can hardly be designated as colonies. Unorganized territories, such as Alaska and the Indian Territory, as we have seen, possess no local government and are not usually subject to the Constitution and Federal laws but are ruled directly by Congress. Organized territories, such as New Mexico and Arizona, are portions of the national domain over which Congress has extended the Constitution and Federal laws and in which a local government has been allowed to be established.¹² Territories may be considered as either organized or unorganized dependencies or provinces, these words being in reality synonymous terms. The word "colony" has no place in the history of our government.

It is natural for the people of the United States to turn to the Federal Constitution, the bulwark of their rights and liberties, for the solution of all kinds of governmental problems, and in so doing there is a tendency to overlook one of its principal objects and purposes, namely: *To provide means for the better distribution, exercise, and regulation of a greater part of the sovereign power of the United States than had existed under the Articles of Confederation.* From the recognition of the independence of the United States among nations, from 1783 until 1787, and until the time of its adoption, this government existed, however, and exercised sovereign power without the Constitution. Since its adoption and up to the present time, the government, in numerous cases, has exercised sovereignty independently of the Federal Constitution.

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¹² U. S. Rev. Stat., Secs. 1839-95.

THE NATURE OF THE LIABILITY OF SHARE-
HOLDERS OF A CORPORATION, UNDER
STATUTE IMPOSING A LIABILITY
ADDITIONAL TO THAT FOR
STOCK SUBSCRIBED.*

It is a legal principle firmly established in our law, that the members of a corporation are liable for its debts to the par value of the stock subscribed by them respectively.¹ This liability cannot be increased by the by-laws of the corporation. Only by a provision in the charter, or other legislative action, can this be done.² It will be our endeavor to discuss the nature of the liability thus increased by legislative action.

The origin of the doctrine that the stockholders are not personally liable for the debts of the corporation seems to be that the corporators contracted those debts in a particular capacity, and could not be sued except in that capacity; *i. e.*, the contract was made with the corporators associated together as a corporation, and suit upon the contract could only be brought against the contractors in their corporate capacity. In *Spear v. Grant*, 16 Mass. 9, (1819), seventy-five per cent of the capital of the X. bank was divided among the stockholders, twenty-five per cent being deemed sufficient to pay all the debts of the bank. Default was made by some of the directors, who subsequently became insolvent, and the fund was found insufficient to pay the debts. A., one of the creditors of X., sued B., a stockholder, in an action on the case, B. having received from the corporation a larger sum than the amount A. claimed. The court held, that the promise to support the action in this case was made not by the stockholder but by the corporation, who alone can be sued, and, therefore, A. cannot recover in this suit.

On judgment being recovered against the corporation, in

*Awarded Meredith prize.

¹Carr v. Iglehart, 3 Ohio St. 457 (1854).

²Trustees of Free School v. Flint, 13 Metc. 539 (1847).

case of municipal corporations, execution issued against it can be satisfied out of the private property of the members of the corporation. This was the rule under the common law in England until changed by statute, and is the rule at the present time in the New England States.⁸

In case of private trading corporations the common corporate name was not a sufficient designation of the corporators to authorize the sheriff to seize upon their private property on a judgment and execution recovered against the corporation.

But in equity these technical objections could not stand in the way of holding these corporators personally liable for the debts of the corporation. Accordingly in *Dr. Salmon v. Hamborough Co.*, 1 Chan. Cases, 294, (1671), the plaintiff having a claim against the defendant corporation, had been unable to compel its appearance to answer his demand against it in a court of law, since it had no corporate property upon which distress could be made, there being at that time a rule of law that the appearance of a corporation could be compelled only by a writ of distringas. The plaintiff, therefore, filed a bill in equity. The lower court dismissed the bill. On appeal to the House of Lords the plaintiff produced two precedents where relief was granted on such a state of facts. This decree was reversed by the House of Lords, and an order was made that if the company does not appear, the bill should be taken *pro confesso*, and if the company does appear and the claim is found to be just, an order should be made on the governor and the twenty-four members of the company, that there should be levations or assessments made on the members until such a sum is produced as would answer the plaintiff's claim. This was subsequently done and enforced by process.

The case just considered was followed to its fullest extent in *Hume v. Winyon & Waldo Canal Co.*, 1 Carl. L. J. 217, (1828). In this case a bill in equity was filed against certain members of the defendant canal company, a corporation, to compel them to pay the complainant the balance of a debt due him on work done on the canal of the said company. One member alone defended, on the ground *inter alia* that

⁸ See *Horner v. Coffey*, 25 Miss. 434 (1853).

members of a corporation are never liable in their individual capacity for acts or debts of the corporation unless the act creating makes them so. The object of this corporation, as expressed in the act incorporating it, was to open canal navigation between certain bodies of water. No specific funds were assigned to this object, and as a means of supplying funds the stockholders passed a resolution that assessments be made on the individual members in proportion to the shares owned by them. It appeared that at the time the bill in this case was filed, this company was "existing nominally without any efficiency." Chancellor Desaussure, before whom the case came up, following the case *Dr. Salmon v. Hamborough Co.* (*supra*), held that the members are individually liable to the creditors of the corporation, and granted the relief prayed for. This was affirmed on appeal.

Jewett v. Thames Bank, 16 Conn. 511, (1844), is the earliest case after *Dr. Salmon v. Hamborough Co.* (*supra*), where equity did not allow a debt of the corporation to be enforced against an individual stockholder. In this case the B. bank was the holder of a note given by the X. society, a religious organization incorporated by statute. B. sued X., recovered judgment, and issued execution, attaching certain shares of stock in the Y. bank belonging to A., a member of the X. society. A. filed a bill in equity to restrain B. from further proceeding against his property. The court granted the relief prayed for, saying, that: "Neither in this country nor in England has it ever been supposed that the private property of a private voluntary corporation could be taken to satisfy the debt of the corporation unless so made by the charter. On the contrary a different doctrine has been everywhere established." But we have seen that both in this country and in England equity did enforce a debt, due from a private corporation, against the private property of its members.

From these considerations it will be seen that the present maxim that the members of a corporation are not liable individually for the debts of the corporation is a very modern rule of law, recognized to its fullest extent both at law and in equity, only in the more recent times. And evidence tends to show that originally the liability of a stockholder differed

in no respect from that of a partner for the debts of the firm; *i. e.*, the members of the corporation were liable without limit for the debts of the corporation.

When the rule of limited liability began to be applied in cases of commercial corporations, evidence tends to show that at least in America the unsatisfactory commercial result of such a rule was at once recognized, and the legislatures of those states in which business corporations were an important factor were not long in modifying this rule. The earliest corporation chartered in this country—"The Philadelphia Contributionship for Insuring Houses from Loss by Fire"—was chartered in Pennsylvania in 1768. The Bank of North America was chartered by Congress in 1778. The Massachusetts Bank in Massachusetts in 1784. The Associated Manufacturing Iron Company in New York in 1780. About one hundred companies were incorporated before 1800: insurance, turnpike, bridge, religious, educational, etc. There were several manufacturing companies in Massachusetts and a very few in the other states. No decisions on corporation law were made by the courts of America till the dawn of the present century. Before that time all the corporation law known here was derived from English cases and text-books.

When decisions began to be made in this country pertaining to these corporations and the principle of non-individual liability of stockholders of commercial corporations enunciated, we find the legislatures turning their attention to this question. Accordingly in New Hampshire an act, passed in 1806 incorporating a certain bank, provided that if the bank shall at any time divide its stock and neglect to pay any bills issued by it, the stockholders, assigns and members of the said bank shall in their private capacity be severally and jointly liable to the holders of any such bills. In Pennsylvania an act was passed in 1808 providing that if any association of individuals shall thereafter be engaged in banking, every member thereof shall be individually and personally liable for the debts of the association. Whether this act can apply to corporations or not, (see *Myers v. Irwin*, 2 S. & R. 368, 1816) an intention is manifest of avoiding non-individual liability of banking associations of any kind.

incorporated or not incorporated. In Massachusetts, where there was the largest number of manufacturing corporations, a general act as early as 1808 made the property of members of such a corporation liable to be levied on, to satisfy judgments recovered against it. In Connecticut, a charter granted in 1814 imposes a personal liability on the stockholders. In New York an act of incorporation passed in 1825 imposes a liability of common law carriers on the stockholders of a transportation corporation. Maine in 1836 passed an act like the one in Massachusetts; Vermont and Rhode Island passed various acts imposing individual liability during the first half of this century. England in 1824 made the members of a certain corporation liable in a way similar to the Massachusetts act of 1808.

These facts show, that instead of stockholders of business corporations being always free from liability for their debts until the legislature imposed an individual liability, their non-liability existed only long enough for the community to know of its existence, and to understand the disadvantage of such a rule of law.

One is impressed with the fact that in the earlier cases on the subject of the liability of stockholders of corporations under special legislative enactment, the courts in nearly all instances considered that the effect of these statutes was to make the stockholders liable as common law partners. But in process of time the courts lost sight of the historic reasons for passing these statutes, and constructed various theories as to the nature of this liability. The result was a great confusion in the law pertaining to this subject, which would not have been possible had the courts steadily adhered to the views held in the earlier cases and to the historical significance of these statutes.

A gradual change in the nature of the legislation also took place. At first this liability of the stockholders was very generally made unlimited. It was found, however, that in those states where such statutes existed the corporations could not thrive, and were driven to the states where the law was not so unfavorable to stockholders. Accordingly these statutes were modified, and the favorite mode of imposing liability became the so-called "double liability;" that is to say,

the shareholders are made liable for the debts of the corporation to the amount equal to the par value of the stock subscribed by them respectively, which has been universally interpreted to mean that, beside his clause liability to pay the par value of the stock, the shareholder shall be liable to an amount equal to that value.⁴

1. *The liability imposed by these statutes is a partnership liability.*

In *Allen v. Sewell*, 2 Wend. 327, (1829), the act incorporating the X. Steamboat Co. provided that the members of the said corporation shall be liable, in the same manner as at common law for transportation of all goods, etc., as common carriers. A. delivered a package to the agent of X., which was lost. He then brought an action on the case against some of the stockholders in X. to recover the value of the package. The court *held*, that the defendants were liable to the same extent and in the same manner as if there were no act of incorporation. It is true that A. should have joined all the members of the corporation in the suit, but this defect could be taken advantage of only by a plea in abatement.

There are other authorities (a partial list of which will be found in the note below) taking the view that this liability is a partnership liability, in one respect made more onerous by statute, in that it is generally several as well as joint.⁵ Examples of a variety of views on the subject are

⁴ *Willis v. Mabon*, 48 Minn. 140 (1892); *Root v. Sinnock*, 120 Ill. 350 (1887), *Schofield, J.*; *McDonnell v. Alabama Insurance Co.*, 85 Ala. 401 (1888). In *Maxwell's case*, L. R. 20 Eq. 585 (1875), *Malins, V. C.*, the articles of association of a certain corporation provided that if there are no corporate assets to pay certain debts of the corporation the stockholders shall contribute ratably to the shares held by them. The court held that the liability imposed here was over and above the value of the stock of each shareholder. In *Dreisbach v. Price*, 133 Pa. 560 (1890); s. c. 19 Atl. 569, the court interpreted the provisions of the act of 1873 which declares that each stockholder of the said bank shall be responsible for the debts of the corporation to double the amount of stock subscribed by him, to mean that besides his common law liability for the stock held by him, the stockholder is liable to double its par value.

⁵ *Maya v. Russ*, 3 Conn. 52 (1819); *Marcy v. Clark*, 17 Mass. 330 (1821); *Deming v. Bull*, 10 Conn. 409 (1835); *Moss v. Oakley*, 2 Hill,

not hard to find. In *Hanson v. Donkersley*, 37 Mich. 148, (1877), A. did some work for the X. corporation and accepted its note, on which, not being paid at maturity, he sued X., recovered judgment and issued execution, which was returned unsatisfied. He then brought an action against certain stockholders of X. to enforce the liability created by a statute which provided that the stockholders shall be individually liable for all labor performed for the corporation and that the creditor may enforce this liability after an execution shall have been returned unsatisfied. The court affirmed judgment against A. on the ground that this liability cannot be a primary liability but is that of a surety who was discharged by A's acceptance of the note from the corporation.⁶

265 (1842); *Bailey v. Bancker*, 3 Hill, 188 (1842); *Corning v. McCullough*, 1 N. Y. 47 (1847); *Stanley v. Stanley*, 26 Me. 191 (1846); *Conant v. Van Schaick*, 24 Barb. 87 (1857); *Coleman v. White*, 14 Wis. 700 (1862); *Erickson v. Nesmith*, 46 N. H. 371 (1866); *Thompson v. Meisser*, 108 Ill. 359 (1884); *Schalucky v. Field*, 124 Ill. 617 (1888). In *Paine v. Stewart*, 33 Conn. 516 (1866), *Butler, J.*, the court said that this liability is of the same character as that incurred by an association of individuals having no corporate existence; *ex necessitate rei* it must be enforced severally. In *Marshall v. Harris*, 55 Iowa, 182 (1880), *Adams, C. J.*, the court held that the liability of the stockholders of a corporation, under a statute, for failure to substantially comply with the requirements of the general incorporation act, is the same as if no attempt had been made to incorporate the association. In *Mokelumne Hill Canal Co. v. Woodbury*, 14 Ca. 265 (1859), *Cope, J.*, the court said: "It has been frequently decided that members of a corporation who are answerable personally for the corporate debts and liabilities stand in the same position in relation to the creditors of the corporation as if they were conducting their business as a common partnership." And in *Buchanan v. Meisser*, 105 Ill. 638 (1883), *Scholfield, J.*, the court said that by imposing such a liability "the effect of this is simply to withdraw from the stockholders the protection of the corporation and to leave them liable as partners."

⁶In *Jackson v. Meek*, 87 Tenn. 69 (1888), *Tarver, J.*, the court held that a creditor is not prevented from recovering against a stockholder on his personal liability, by taking a note from the corporation, obtaining judgment against it or receiving a *pro rata* share on his claim out of the corporate assets. In *Hatch v. Burroughs*, 1 Woods, 439 (1870), *Woods, J.*, the court held that stockholders in a corporation whose property is, by the charter, at all times pledged to redeem the notes issued by the bank, in proportion to the stock held by them, are not sureties but principals. And in *Sonoma Val. Bank v. Hill*, 59 Ca. 107

And in *Patterson v. Wyomissing Mfg. Co.*, 40 Pa. 117, (1861), the court said that the liability of the stockholders under the act of 1853, declaring that they shall be jointly and severally liable for all the debts, etc. of the corporation in which they are stockholders, is "secondary not primary; collateral not principal; analogous to the case of guarantee, to be enforced if the regular process of the principal contract proves fruitless or if the corporation becomes insolvent."⁷ The decision of *Hanson v. Donkersley* (*supra*) is virtually if not in terms overruled by *Bank v. Warren*, 52 Mich. 557, (1884), which holds that the stockholders of the bank by the terms of the association are originally liable as co-debtors with the bank.

In *Diversey v. Smith*, 103 Ill. 378, (1882) a statute provides that the trustees and incorporators shall be severally liable for all the debts of the corporation till the whole capital stock of the company shall have been paid in, and a certificate, stating that fact, be filed and recorded. The court held that this liability was in the nature of a penalty, and so an action to enforce it did not survive against the executor of a deceased stockholder.

In *Derrickson v. Smith*, 27 N. J. L. 166, (1858), the court held that a statute of New York, which provides that the company incorporated under this act shall annually publish and record a statement of its assets and liabilities and in default of doing so all the trustees of the said corporation shall be jointly and severally liable for the debts of the company, is a penal act and so is enforceable only in the jurisdiction where the penalty is created.⁸

(1881), Thornton, J., the court decided that the possession of property of the corporation, as a pledge for its indebtedness did not prevent the pledgee from recovering against a stockholder in the corporation on his personal liability, on the ground that the stockholders were not sureties but were made principal debtors.

⁷ See also *Means' Appeal*, 85 Pa. 75 (1877), Mercur, J. But in *Craig's Appeal*, 92 Pa. 396 (1880), Gordon, J., the court denied that the liability is that of a surety.

⁸ See also *Halsey v. McLean*, 12 Allen, 438 (1866); *First National Bank v. Brice*, 33 Md. 487 (1870); *Price v. Wilson*, 67 Barb. 9 (1873). In *Merchants' Bank v. Bliss*, 35 N. Y. 412 (1866), the court held that the Statute of Limitations applicable to the recovery of forfeitures and

In *Marshall v. Sherman*, 148 N. Y. 9, (1895), an action was brought by certain creditors of a bank organized under the laws of Kansas against a stockholder of the same, residing in New York. The statute under which the bank was organized provided that if any execution against a corporation shall have been issued and returned *nulla bona*, execution may be issued against its stockholders to the par value of their stock, or the execution creditor may proceed in an action at law to charge the stockholders with the amount of his judgment. The court held that overruling a demurrer to this action was error, on the ground that this remedy against the stockholder is a creature of statute, to be enforced only in the domicile where this liability was created.⁹

But there are several cases, subsequently decided, which take a view contrary to this case. In *Mechanics' Savings Bank v. Fidelity Ins. Co.*, 87 Fed. 113, (1898), Judge Dallas held that the same statute passed upon in *Marshall v. Sherman* (*supra*) is enforceable by an action at law in the Eastern District of Pennsylvania, and this ruling was affirmed in 97 Fed. 297, (1899). And in *Hancock National Bank v. Ellis*, 166 Mass. 414, (1896), the same statute was enforced in Massachusetts, and this ruling was approved in 51 N. E. 207, (1898), in a suit between the same parties.¹⁰

Derrickson v. Smith, above referred to, and similar cases are questionable decisions in view of *Huntington v. Attrill L. R.*, (1893), Appeals, 150, where the Privy Council held that a similar statute, passed upon in *Derrickson v. Smith*, is not a penal act within the rule of International law, which declares that penal statutes are not to be enforced outside of the jurisdiction where they are passed,—the purpose of the act being not to punish a wrong against the public justice of

penalties, *i. e.*, three years, applies to such cases; and in *Stokes v. Stickney*, 96 N. Y. 323 (1884), the court decided that an action to recover such a liability does not survive against the personal representatives of a deceased trustee.

⁹ See also *Tuttle v. National Bank*, 161 Ill. 497 (1896), and *Hancock National Bank v. Farnum*, 40 Atl. 341 (1898); *s. c.* 20 R. I. 466. And see *May v. Black*, 77 Wis. 101 (1890).

¹⁰ See also *Ferguson v. Sherman*, 116 Ca. 169 (1897); *s. c.* 47 Pac. 1023.

the state, but to provide a remedy to the person injured by the wrongful act.¹¹

In connection with *Diversey v. Smith*, above referred to, may be mentioned several cases. In *Cochran v. Wiechers*, 119 N. Y. 399, (1890), a statute provided that the stockholders of the X. corporation shall be severally liable for all debts, etc., of said corporation until the whole amount of the capital stock shall have been paid in and a certificate thereof filed and recorded. The plaintiffs in this case, judgment creditors of X., the full capital stock of which had not been paid in, sued the stockholders to enforce this liability. A., who was made one of the defendants, was served with the complaint, and subsequently died. The plaintiffs applied to the court for leave to continue the action against A.'s executor. This the lower court refused, on the ground that the cause of action was penal. The Court of Appeals held that this was error.¹²

In *Richmond v. Irons*, 121 U. S. 27, (1886), Matthews, J., A., one of the stockholders of a certain corporation, died during the pendency of a suit to enforce the statutory liability of the stockholders. This suit was revived against A.'s administrator, who contended that A.'s liability did not survive. The Court held this contention to be unsound. In *Corning v. McCullough*, 1 N. Y. 47, (1848), an action was brought to enforce the statutory liability of a stockholder of a certain corporation. The defence was that the action had not accrued within three years, and, as it is to enforce a penalty, it was barred by the statute of limitations applicable to such cases. The court held that this was not a good defence.

The law seems to be settled that a statute, which imposes an individual liability on stockholders until certain acts are done, as until certain steps of incorporation are taken, or until all the capital stock is paid in, does not create a penalty. Such a statute, it is held, continues the liability of partners until certain acts are done when and when only the rights of

¹¹ See also *Huntington v. Attrill*, 146 U. S. 657 (1892).

¹² See also *Norris v. Wrenschall*, 34 Md. 492 (1871); *Maxwell's case*, L. R. 20 Eq. 585 (1875); *Cuykendall v. Miles*, 10 Fed. 342 (1882).

limited liability, which the law grants to members of corporations, are given to these associates. [*Cochran v. Weichers* (*supra*) and the cases following.] The case of *Diversey v. Smith* (*supra*) must, therefore, be regarded as no longer tenable. We may assert further that an act which makes the trustees and shareholders of a corporation individually liable for its debts, in case the corporation neglects or refuses to perform certain duties, does not create a penalty, but imposes a partnership liability. There can be no basis of a distinction in law whether the omission, upon which the liability of the stockholders rests, took place before the corporation began to do business or after the business had been carried on.

There are some very respectable authorities which hold that this liability of the stockholder is founded upon contract.¹³ It is submitted that this liability is a contract liability only when the claim of the creditor sounds in contract, and it is begging the question to denominate this liability of the stockholder, as such, to be a contractual liability.

As a result of the discussion of the foregoing cases we can affirm that this liability is not that of a surety nor is it a secondary liability of any kind; is not a penalty, is not a pure creature of statute, a new thing in the law; and is not a contractual liability as such. We can also affirm the following proposition, that the statute which imposes an individual liability on the stockholder, over and above his liability to pay the par value of the stock subscribed by him, renders him or, as some of the courts have said, leaves him liable as a partner at common law with such limitations and such only as the statute prescribes. The theory underlying this proposition is adequate to explain the nature of these statutes; is founded on true legal principles, and has the express sanction of the

¹³ In *Branch v. Baker*, 53 Ga. 502 (1874), Warner, C. J., the court held that this liability becomes a contract between the stockholders and the state, when the former subscribe to the stock of the corporation. See *Corning v. McCullough*, 1 Comst. [N. Y.] 47 (1847); *Hawthorne v. Calef*, 2 Wall. 10 (1864); *Davis v. Weed*, 44 Conn. 569 (1877); *Aultman's Appeal*, 98 Pa. 505 (1881); *Brown v. Hitchcock*, 36 Ohio, 667 (1881); *Nimick v. Mingo Iron Co.*, 25 W. Va. 184 (1884); *Schertz v. First National Bank*, 47 Ill. App. 124 (1893); *Ferguson v. Sherman*, 116 Ca. 169 (1897); s. c. 47 Pac. 1023.

court. Should such a proposition be accepted, a firm basis for solving the problems presented in this class of cases and a uniformity of decisions upon them would be the important and obvious result.¹⁴

2. *It follows from the partnership theory that: A. The stockholders cannot enforce this liability against each other.*

In *Bailey v. Bancker*, 3 Hill, 188, (1842), Bronson, J., the charter of the X. company provided that the stockholders shall be jointly and severally liable for all demands, etc., against X., provided, however, that judgment and execution be first recovered and issued against X. and returned unsatisfied. A. and B. stockholders of X., held a note of X., payable to C. & Co., a certain firm, and endorsed by the said firm. A. and B. sued X. on this note, recovered judgment, and issued execution, which was returned *nulla bona*. They then recovered a judgment against C. & Co. on their endorse-

¹⁴ *Whitman v. National Bank of Oxford*, decided August 1, 1900, by the Supreme Court of the United States, decided since this essay was originally prepared, is a case where an action was brought against a stockholder of the X. bank, incorporated under the laws of Kansas, to enforce his individual liability under the Kansas statute. Held that this action will be enforced in the Southern District of New York, as it is not a statutory penalty, and so is enforceable out of the jurisdiction of the state creating the remedy. "It would not be doubted," the court said, speaking through Brewer, J., "that if the stockholders in this corporation had formed a partnership, the obligation of each partner to the other and to the creditors would be contractual, and determined by the common law in respect to partnerships. If Kansas had provided for partnerships with limited liability, and these parties, complying with the provisions of the statute, had formed such a partnership, it would also be true that their obligations to one another and to one of the creditors would be contractual. . . . And it is none the less so when these same stockholders organized a corporation under the law of Kansas, which prescribes the nature of the obligations which each thereby assumes to the other and to the creditors." While the court considered this liability as based on the ground of a contract between the stockholders and the corporation, still the court based its decision on the true principle which is, that there is no distinction, either in law or in fact, between the individual liability of stockholders under the statutes and the liability of partners, for the debts of the corporation and partnership, respectively.

ment, and assigned their judgment against X. to C. & Co., who brought suit in the name of A. and B. against the stockholders of X. The court held that A. and B. could not have recovered in this suit; that the stockholders, with reference to this statutory liability, must be considered as partners, and so cannot maintain suit at law against one another on this liability. Otherwise if A. and B. were allowed to recover in this case against the defendant, the latter could turn around and sue A. and B. with equal right to recover from them. This would be preposterous. The court held further that C. & Co. stand in the position of A. and B., and hence cannot recover. To the same effect is *Thayer v. Union Tool Co.*, 4 Gray, 75, (1855), where the court did not allow A., a stockholder, to issue attachment against certain other stockholders of the debtor corporation, under a judgment recovered against the corporation, the court saying that A. is not within the letter and spirit of the statute providing such remedy to creditors of the corporation.

In *Hollister v. Hollister Bank*, 2 Keyes, (N. Y.), 241, (1865), the X. bank became insolvent and assessments were made on its stockholders under the act of 1849, which provided that the stockholders shall be liable equally and ratably for the debts of the corporation. On account of the insolvency of some of the stockholders a part of the assessments were not collected. On application of the receiver for an order to distribute the amount collected among the creditors, several of the stockholders who had paid the assessments claimed that by virtue of such payments they had become creditors of X. and were entitled to be included with the other creditors in this distribution. The court held that they were debtors of the creditors of X., and cannot participate in this distribution till these creditors are paid.

B. *A stockholder cannot claim a set-off because of a debt due him from the debtor corporation.*

Where the stockholder is sued individually and the liability is not limited in amount, it is difficult to see how a set-off could be allowed because of a debt due him from the corporation. Where he is liable only to a limited extent, as, for example, to an amount equal to the par value of his

stock, it is equally difficult to see why such set-off should be permitted. The law is clear that a partner under such circumstances cannot defeat the right of a firm creditor, to recover the debt against him, by showing that he has a claim against the firm. The same rule should apply when a stockholder is sued on his statutory liability. He is a partner, liable as such for the debts of the corporation, only his liability is limited in amount by statute. The law should not allow the fund created for the benefit of the corporate creditors to be dissipated by the stockholders who are the debtors of such creditors.

In the case of *Mathez v. Neidig*, 72 N. Y. 100, (1878), where a suit was brought by a corporate creditor against a stockholder in the corporation to enforce his personal statutory liability, the court allowed a plea of set-off, of a debt due from the corporation to the defendant, to defeat the plaintiff's right to recover.¹⁵ It is submitted, under the above considerations, that this case was wrongly decided.

In the *Fidelity Insurance Co. v. Mechanics' Bank*, 97 Fed. 297, (1899), the A. bank, having recovered judgment against X., a corporation organized under the laws of Kansas, and having issued execution which was unsatisfied, then brought action against the B. company, administrator of C., one of the stockholders of X., to enforce the individual statutory liability of C. B. defended on the ground that C. at the time of his death was the holder of bonds of X. greater in value than the par value of his stock, which bonds, B. claimed, should be set off against C.'s liability in this action. The court held, reversing the court below, that B. is entitled to the set-off claimed, the court, however, emphasizing the fact that this was the interpretation given to the statute in the Kansas courts.

When a creditor's bill in equity is filed against all the corporators, making the corporation a party defendant, then as

¹⁵ See also *Musgrave v. Association*, 49 Pac. 338 (1897), where the court followed the decision of *Mathez v. Niedig*. Maham, P. J., filed a strong dissenting opinion in this case holding that on partnership principles no such set-off should be allowed. And see *Ball v. Anderson*, 196 Pa. 86 (1900). In *Buchanan v. Meisser*, 105 Ill. 638 (1883) and *Thebus v. Smiley*, 110 Ill. 316 (1884) Scholfield, J., the court decided that set-off in such a case will not be allowed.

the equities of all the parties are adjusted, the stockholder having a claim against the corporation should be allowed to prove that claim with the other creditors, but not even in such a case should he be allowed to set off his claim against his statutory liability, for then he would be permitted to get an advantage over the other corporate creditors from the mere fact that he is a stockholder, as this set-off might pay his debts in full, while the other creditors might only get a small percentage of their claims.¹⁶

Where the stockholder pays a debt of the corporation, for which the statute renders him liable, he is discharged from the liability under the statute if the amount so paid is equal to the amount of his liability,¹⁷ and it is a defence *pro tanto* where it is not equal to the amount for which he is liable.¹⁸ An interesting case is *Thompson v. Meiser*, 108 Ill. 359, (1884). In this case the X. bank, in which A. was a depositor, failed. Thereupon A. brought suit against B., a stockholder of X., holding a share of \$1,000, to enforce his statutory double liability. B. claimed to have discharged this liability. It appeared that B., C., D. and E., each holding a share of \$1,000 in the X. bank, had respectively bought deposit certificates against X. worth \$1,000 at fifteen cents on the dollar. B. then confessed judgment in favor of C., C. in favor of D., D. in favor of E., and E. of B. Then E. borrowed \$1,000, which he paid to B., B. paid it to C., C. paid it to D., and D. to E., E. returning the money to the place where he borrowed it. It, therefore, appeared on the record that the above judgments were satisfied. Did this transaction discharge B.? The court held: (1) That stockholders cannot maintain a suit on this liability against each other (in accordance with the view we have heretofore ex-

¹⁶ *Trust Co. v. Ins. Co.*, 18 N. Y. 199 (1858). In *Hillier v. Allegheny Co. Ins. Co.*, 3 Pa. 470 (1846), Gibson, C. J., a mutual insurance company brought an action against B., one of its members, to recover on a premium note. B. claimed a set-off because of a loss by fire of property insured in this company. It was admitted that the funds of the company were not sufficient to pay all the debts of the company. The court held, that set-off will not lie as B. might thus get more than the other creditors.

¹⁷ *Lane v. Harris*, 16 Ga. 217 (1854).

¹⁸ *Briggs v. Penniman*, 8 Cowen, 387 (1826).

pressed). It follows that, as B. paid to a person to whom he was not liable under the statute, he has not discharged his liability to the creditors thereby. (2) That, in an action by the creditor against the stockholder of a corporation to enforce this liability, the latter cannot set-off a debt due him from the corporation. So B. could not set-off the claim against the corporation by reason of the deposit certificate which he had bought. (3) That, to discharge one's self of this liability the stockholder must pay one hundred cents on the dollar, *bona fide*.¹⁹ It follows from these considerations that B. was not discharged, and is liable in the present suit.

C. *The statute of limitations begins to run at the same time against the stockholders as against the corporation.*

If this liability be regarded as a partnership liability and the stockholders liable co-ordinately with the corporation, the statute of limitations should begin to run at the same time against the stockholder as against the corporation.

In *Schalucky v. Field*, 124 Ill. 617, (1888), Magruder, J., a statute provided that when default shall be made in the payment of any debt or liability contracted by a certain bank, the stockholders shall be individually responsible to an amount equal to their respective stock. A., a depositor in this bank, brought an action against B., a stockholder, to enforce his liability under this statute. According to the laws of Illinois it is provided that where the cause of action sued upon is based upon written evidence of the indebtedness, the period of the statute of limitations is ten years; where the debt is not founded upon a written statement the period is five years. As A.'s cause of action in this case was based upon the written evidence of the deposit in the bank,

¹⁹ *Abbey v. Long*, 44 Kans. 688 (1890). See also *Manville v. Karst*, 16 Fed. 173 (1883), Treat, J., where the court held that after a suit is instituted, the stockholder cannot defeat the creditor's right to recover against him on his personal liability, by confessing a judgment in favor of a friend who had bought a claim against the corporation at a discount. And in *Jones v. Wiltberger*, 42 Ga. 575 (1871), it was decided that after a depositor of a bank brings an action against a stockholder of the same, on his personal liability, the defendant cannot defeat the rights of the plaintiff to recover by paying the amount for which he is liable to another depositor of the bank.

it is clear that if this action were against the bank the period of ten years would apply. In the present case B. defended on the ground that the cause of action did not accrue within five years and therefor he is not liable. The court, in deciding that the period of ten years applied against B. as well as against the bank, used the following language: "When a debt was contracted by the bank, the liability of those who were then stockholders attached, and from that moment, they became bound in the same manner and with like effect as if they had been doing business as partners, unincorporated. . . . It follows that the stockholders occupy the same relation to the creditors as the bank does, so far as the statute of limitations is concerned."

In *Davidson v. Rankin*, 34 Cal. 503, (1868), an action was brought by A., a creditor of the X. corporation, against B., the executor of C., a deceased stockholder of X., to enforce the liability of C.'s estate, created by a statute which provides that each stockholder shall be individually liable for his proportion of all the debts of the corporation, incurred while he was a stockholder. The cause of action in this case was a wrongful conversion in January, 1864, by X., of eight shares of stock belonging to A. A. brought suit against X. and recovered judgment in 1866. C. died in February, 1864, and B. gave notice to all the creditors. A statute declares that all claims against the estate of a decedent must be presented within ten months after notice is given by the personal representative of the deceased, or it is barred; provided, however, that if the claim be not yet due or is contingent, it may be presented within ten months after it becomes due or absolute. The court held that the debt accrued against C., at the same time as against X., and was in no sense a claim contingent upon inability to recover against X. It follows therefore that the present case did not come within the exception provided for in the act, and so A. was barred by not presenting his claim ten months after he had received notice from B.²⁰

The court in *Terry v. Calman*, 13 S. C. 220, (1879), took

²⁰ See also *Freeland v. McCullough*, 1 Denio, 414 (1845); *Conklin v. Furman*, 48 N. Y. 527 (1872); *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313 (1875); *Hyman v. Coleman*, 82 Ca. 650 (1890).

a different view, and held that the statute began to run from the time the bank failed.²¹ It is submitted that this is not sound unless this liability has its origin only upon a bank's failure to pay. Such is not the true interpretation of the statutes having reference to this liability. The liability of the stockholder is co-ordinate with the existence of the debt, but the statute restricts the enforcement of it till the remedies, instituted directly against the corporation, have failed.

But where the statute provides that, in case some act is done or omitted, the stockholders shall be individually liable for the debts of the corporation, it would seem that the statute, against the creditors, should begin to run when this act or omission takes place, as only then does the stockholder become liable to the creditors.²²

3. *But a transfer of the stock relieves the transferrer from this liability.*

In *Middletown Bank v. Magill*, 5 Conn. 28, (1823), the charter of the X. corporation provides that the "personal property of the members of the said corporation shall at all times be liable for all debts due by the said corporation." A., a creditor of X., brings suit against B., who was a stockholder of X. at the time this debt was contracted, but before this suit was brought he had transferred his stock to a third person. The court held that B., when he ceased to be a member, ceased to be liable. The dissenting opinion by Hosmer, C. J., was to the effect that as B.'s liability is that of a partner, and those are liable who were partners at the time the debt was contracted, therefor B. should be held liable. This case presents then both views that have been taken on the

²¹ *Longley v. Little*, 26 Me. 162 (1846); *Terry v. Tubman*, 92 U. S. 156 (1875); *Terry v. Anderson*, 95 U. S. 628 (1877); *Godfrey v. Terry*, 97 U. S. 171 (1877); *Barrick v. Gifford*, 47 Ohio, 180 (1890).

²² In *Losee v. Bullard*, 79 N. Y. 404 (1880), *Rapallo, J.*, an action was brought by a creditor of a corporation against the trustee of the same to enforce his personal liability arising because of his neglect to file certain annual statements. The court held, that the Statute of Limitations began to run when the plaintiff's cause of action accrued and the failure of the trustee to file annual statements each year from that time did not prevent the running of the statute.

subject, the view which prevails being the one adopted by the majority of the court in this case.²⁸

On partnership principles the stockholder who was such when the debt was created should be liable, and the decision in the above case must be considered as contrary to this principle. But there are certain instances in the common law where a right or liability, instead of being attached to a certain person, is attached to one because he occupies a certain relation. Blackstone furnishes such an instance in commons appendant, which is a right of commons belonging to one by virtue of his occupation of certain land; and this right is distinct from commons in gross, which is a right of commons belonging to an individual in person. The same differentiation exists in the right of advowson. Blackstone furnishes us with another excellent example in the corporation sole, as the bishop. When A., the bishop, contracts a debt in

²⁸ The following cases hold that those are liable who were stockholders when the debt was contracted: *Mill Dam Foundry v. Hovey*, 21 Pick. 417 (1839); *Carver v. Braintree Mfg. Co.*, 2 Story 432 (1843); *Holyoke Bank v. Goodman Paper Mfg. Co.*, 9 Cush. 576 (1852); *Chesley v. Pierce*, 32 N. H. 388 (1855); *Larrabee v. Baldwin*, 35 Ca. 155 (1868); *Williams v. Hanna*, 40 Ind. 535 (1872); *Wheeler v. Faurot*, 37 Ohio, 26 (1881). In *Brown v. Hitchcock*, 36 Ohio, 667 (1881), the court held that the liability attaches personally to him who was a member when the debt was contracted but if he subsequently assigns his stock, the assignee impliedly undertakes to indemnify him from his liability, and when the suit is in equity, equity will so mould the decree as to charge him who is ultimately liable. The following cases adopt the majority opinion of *Middleton Bank v. Magill*: *Adderly v. Storm*, 6 Hill, 624 (1844); *Wheelock v. Kost*, 77 Ill. 296 (1875); *Keyser v. Hitz*, 133 U. S. 138 (1889); *Barrick v. Gifford*, 47 Ohio, 80 (1890); *Merrill v. Meade*, 6 Kans. App. 620 (1897); *Rosevelt v. Brown*, 1 Kern [N. Y.], 148 (1854) and *National Bank v. Case*, 99 U. S. 628 (1878), hold that the transferee is liable even though he holds the stocks as collateral security. In *Maxwell's case*, L. R. 20 Eq. 585 (1875) A. and B. held stock in a certain corporation, jointly. The court held that on the death of A. the stock survived to B. and that A.'s estate was not liable for contribution on A.'s share of the stock. *Curtis v. Harlow*, 12 Metc. 3 (1846), and *Root v. Sinnock*, 120 Ill. 350 (1887), hold that those are liable who were stockholders when the liability is sought to be enforced. *Cleveland v. Burnham*, 55 Wis. 598 (1882) and *Sayles v. Bates*, 5 Atl. 497 (1885), hold that those are liable who were stockholders when the debt was payable.

his official capacity, and subsequently he is succeeded in office by B., A. is no longer liable for the debt, but B. is liable. In the same way any right which attached to A.'s person because of his official capacity as bishop while he occupied such a relation, ceased to belong to him immediately on B.'s succeeding him, but became attached to the person of B.

Now while in partnership cases the law is settled that the partner's liability to creditors is not attached to him because of his relation to the firm, but is a personal liability which exists even after the partner severs his relation with the firm, in corporation cases the liability of a member of the corporation is attached to his relation to the association, and when this relation ceases his liability comes to an end. The court then adopted this rule, that the liability follows the relation, as well with respect to the stockholder's common law liability on his stock as with respect to his liability imposed on him by statute.²⁴

It must be understood that, in order for the transferrer to be relieved in any case, the transfer must be *bona fide*, to a man of financial standing. A transfer to a straw-man for the purpose of freeing the transferrer from this liability will not have such an effect. And in *Aultman's Appeal*, 98 Pa. 505, (1882), Sharswood, J., the court held that the transfer of stock after the insolvency of the corporation is not *bona fide*, and will not relieve the transferrer.²⁵

In *Jackson v. Meeck*, 87 Tenn. 69, (1888), the court held that when stockholders transfer their stock they are not thereby relieved from their statutory liability to employes for wages earned previous to the transfer. This decision is in accordance with the view of Hosmer, C. J., in *Middletown Bank v. Magill* (*supra*).

In *Marcy v. Clark*, 17 Mass. 330, (1821), Parker, C. J., replevin was brought by A. against B., who, as sheriff, levied

²⁴ See *Barrick v. Gifford*, 47 Ohio, 180 (1890), Minshall, C. J., where the court said that this liability attaches to every share of stock issued by the company.

²⁵ In *Mokelumne Hill Canal Co. v. Woodbury*, 14 Ca. 265 (1859), Cope, J., the court held that a stockholder cannot rid himself of his liability by selling his stock after suit was brought against his corporation. See to the same effect *Rider v. Fritchey*, 49 Ohio, 285 (1892).

on A.'s goods under an execution issued against a manufacturing company of which A. was a member. Before the levy A. sold his shares of the stock without any consideration to X., a straw-man. A statute provides for the liability of the person and estate of any member of a manufacturing corporation which shall not, within fourteen days after demand, satisfy any execution entered against it. The court rendered judgment in favor of B., holding, 1. That the sale by A. of his stock in this case was a fraud as to creditors, and ineffectual to relieve him of his statutory liability; and 2. That the legislature continued the principles of co-partnership in existence so that in a suit against the corporation all the stockholders are virtually defendants, and a judgment against the corporation makes the stockholders judgment debtors. A.'s property would, therefore, still be liable to be seized in execution on the judgment even if the sale of the stock after the judgment were *bona fide* and, therefore, a valid transfer.²⁶

Certain statutes make both the transferrer and transferee liable, and in *Harper v. Carroll*, 69 N. W. 610, Minn., (1896), the court decided that the liability of the transferrer in such a case is secondary to that of the transferee.

The law then seems to be settled that generally the transfer of stock, if *bona fide* and to a person of means, will relieve the transferrer of his individual liability. If not *bona fide* the transfer does not have the effect of relieving the transferrer. According to some cases, where the stockholder is made personally liable to the employees of the corporation, the transfer of the stock after the labor is performed does not relieve the transferrer. Where the statute makes the stockholder's property liable to be levied on under a judgment recovered against the corporation, a transfer of

²⁶ The following cases hold that under the Kansas statute, those are liable who were members of the corporation when the execution against it was returned *nulla bona*: *Van Demark v. Barons*, 52 Kans. 779 (1894); *Rhode Island Mortgage & Trust Co. v. Moulton*, 82 Fed. 979 (1897); *Brown v. Trail*, 89 Fed. 331 (1898); *Parkinson Sugar Co. v. Topeka Sugar Co.*, 54 Pac. (Kans.) 331 (1898). And in *Nixon v. Green*, 11 Exch. 550 (1856) a similar conclusion was reached in interpreting similar English statutes.

stock after the judgment against the corporation is recovered will not relieve the transferrer of his liability.²⁷

4. *No partner's equity with respect to the assets of the corporation is conferred upon the stockholder by reason of this liability.*

In *Baker v. Backus*, 32 Ill. 79, (1863), Breese, J., the X. corporation was incorporated under a statute which provided that the stockholders under certain conditions shall be individually liable for the debts of X. if half of the capital stock be not paid within one year of its organization, which was not done. A., the administrator of a stockholder in X., filed a bill in equity to have X. dissolved and to have its effects put into the hands of a receiver, alleging that the above statute put the stockholders in the position of partners; that A. wished to have the corporate property applied to pay corporate debts so as to save the estate of the intestate from its corporate liability. The court held that it had no jurisdiction; that the corporation cannot be deprived of its charter on application of one or more of the members, and that the stockholders have no such power as to compel the application of the funds of the corporation so as to exonerate themselves. The mere fact that the stockholders are liable as partners does not deprive the corporation of its rights and privileges as a corporation.

²⁷ In *Bond v. Appleton*, 8 Mass. 472 (1812) there was a statute making stockholders liable to pay bills issued by the bank in which they held stock, when the bank refuses to pay for the same. The court held that those are liable who were members of the bank at the time of such refusal. In *Windham Savings Inst. v. Sprague*, 43 Vt. 502 (1871), Ross, J., the charter incorporating a company, rendered its stockholders liable in case the provisions thereof are infringed. The court held that those are liable who were members when the infringement took place. To the same effect is *Austin v. Berlin*, 22 Pac. [Col.] 433 (1889). In *Steam Engine Co. v. Hubbard*, 101 U. S. 188 (1879), Clifford, J., a Connecticut statute provided that the president and secretary of certain corporations shall be liable if they neglect or refuse to file certain annual certificates. The court held that the president of one of these corporations is not liable for the debt created before such refusal to comply with the statute, though it remained unpaid during such noncompliance.

5. *This liability is enforceable directly by the creditors against the stockholders.*

This liability is created for the benefit of the creditors of the corporation. It is not an asset of the corporation in the same sense that the liability of the stockholder to pay for his stock, is an asset of the corporation. When the creditor enforces this latter liability he virtually enforces a right of his debtor, *i. e.*, the corporation.²⁸ Not so, however, with this liability created by statute. It can in no instance be enforced by the corporation, and its creditor does not attach this liability as a debt due to, or an asset of the corporation. The separate property of the stockholder, not the fund of the association, is by these statutes made liable to answer the demands of the corporate creditors. Hence on the insolvency of the corporation this liability does not pass to its receiver as an asset of the corporation unless so provided by statute.²⁹ And the corporation cannot assign this liability even if such assignment is for the benefit of all the creditors.³⁰ It follows from these considerations that the fact that the property of the debtor corporation is in the hands of a receiver will not prevent the creditors of the corporation from prosecuting a suit against its stockholders to enforce their personal liability under these statutes.³¹

6. *The procedure to enforce this liability is governed by the statute creating it.*

The prerequisite condition of the creditors' right to enforce this liability is (except in rare instances) fixed by statute to be, that all remedies against the corporation should first be exhausted. Accordingly, almost universally, the re-

²⁸ *Patterson v. Lynde*, 106 U. S. 519 (1882), and *Lane's Appeal*, 105 Pa. 49 (1884).

²⁹ *Dutcher v. Marine National Bank*, 12 Blatch. 435 (1875); *Farnsworth v. Wood*, 91 N. Y. 308 (1883).

³⁰ *Wright v. McCormack*, 17 Ohio St. 87 (1866).

³¹ *Sleeper v. Norris*, 59 Kans. 555 (1898); *Runner v. Dwiggins*, 147 Ind. 238 (1897); *Brown v. Trail*, 87 Fed. 641 (1898); *Dexter v. Edmonds*, 89 Fed. 467 (1898); *Fidelity Ins. Co. v. Mechanics' Bank*, 97 Fed. 297 (1899). *Cushing v. Perot*, 175 Pa. 66 (1896), holding a contrary view was overruled in *Ball v. Anderson*, 196 Pa. 86 (1900).

covery of a judgment against the corporation, the issuing of an execution and having it returned *nulla bona*, is made a condition precedent to the proceedings against the stockholder under the statute.³² In case, however, the corporation has been dissolved or is notoriously insolvent, it is unnecessary to take these preliminary steps.³³

This liability may be enforced in four different proceedings depending on the statute creating it.

1. On judgment being recovered against the corporation and execution unsatisfied, the creditor may subject the property of the stockholder to levy under the same or an alias execution.

2. Under the act of 1849 and its successors in Pennsylvania the original action must be brought against the corporation and such stockholders as the creditor desires to hold liable. When judgment is recovered execution must be issued first against the corporation, and, if unsatisfied, against those stockholders who were joined in the suit.

3. The creditor may bring a suit at law against an individual stockholder under the same condition precedent as in (1.).

4. He may file a creditor's bill in equity in behalf of himself and all other creditors of the corporation, against the corporation and all the stockholders.

In *Milroy v. Spurr Mountain Iron Co.*, 43 Mich. 231, (1880), Marston, C. J., the court held that where the statute provides two remedies, by choosing one, the creditor is barred from pursuing the other even if the judgment in the first remedy be unsatisfied. It is suggested that this ruling is not in accord with the spirit of the law in this country.

Where the statute names a remedy that remedy must be pursued to the exclusion of all other remedies.³⁴

³² In *Morrow v. Superior Court*, 64 Ca. 383 (1883), Sharpstein, J., the court held that this liability is primary, and the corporate creditor need not exhaust his remedy against the debtor corporation before proceeding against its stockholders; the statute in that case, however, did not make any provision that a judgment must first be recovered against the corporation.

³³ *Flash v. Conn*, 109 U. S. 371 (1883); *Barrick v. Gifford*, 47 Ohio, 180 (1890); *Latimer v. Bank*, 102 Iowa, 162 (1897).

³⁴ In *Fourth National Bank v. Francklyn*, 120 U. S. 747 (1887) and

7. *The property of the stockholder levied under an execution issued against the corporation.*

The cases of *Stone v. Wiggins*, 5 Metc. 316, (1842), and *Beers v. Bunker*, 6 Kans. App., 697, (1897), hold that levy on the property of the stockholder may not in any case be made until a demand and refusal from the corporation to satisfy the execution issued against it.

In *Stanley v. Stanley*, 26 Me. 191, (1846), Whitman, C. J., after a judgment had been recovered by a creditor of the X. corporation and after execution had been returned unsatisfied the sheriff levied on the goods of A., a stockholder of X., according to the provisions of a statute. A. then brought trespass against the sheriff for the seizure of the goods, and insisted that the private property of an individual cannot be rendered liable to be levied on by virtue of a judgment and an execution against a corporation where he has not been summoned individually to appear and so has no opportunity to defend. The court, rendering judgment against A., held that the effect of the statute is that the members of the corporation are to be regarded as partners, and the suit by the corporate creditor is virtually against the stockholders; that they are, therefore, bound by the judgment in such a suit, and so their property is liable in execution issued against the corporation.

In *Wilson v. Pittsburg, etc., Canal Co.*, 43 Pa. 424, (1862), Lowrie, C. J., a *scire facias sur* judgment, recovered against the X. corporation, was issued against certain stockholders of X., whose person and property were by statute liable to answer when an execution issued against the corporation is unsatisfied. An affidavit of defence was filed which set up matter that would have been a good defence in the original action. It was held that this affidavit was in-

Knower v. Haines, 31 Fed. 513 (1887), the court held that where a state statute, imposing an individual liability on stockholders, prescribes a special remedy, that remedy must be pursued in the Federal Courts to the exclusion of all other remedies. In *Bassett v. St. Alban's Hotel Co.*, 47 Vt. 313 (1875), the court held that a statute, providing that if the officers of certain corporations shall neglect to perform certain acts they shall be liable in an action founded on the statute, provides for a suit at law and a bill in equity will, therefore, not lie.

sufficient, the court saying that the only matter that the defendant could allege is to show that the defendants were not within the statute, as, for example, denying that they were stockholders. In other words, under these statutes the stockholders, as partners, are parties to the suit and so are bound by the judgment.⁸⁵

In *Child v. Coffin*, 17 Mass. 64, (1820), the court held that under the Massachusetts act of 1808, subjecting the property of the stockholders to be levied under an execution issued against their corporation, the goods of a stockholder who died before the commencement of the suit against the corporation cannot be levied on. This decision is in accord with the common law in reference to partnerships which is that on the death of a partner his estate is not liable for the firm's debts.⁸⁶

In England the law seems to be that a summons against a corporation is not enough to bind the stockholders under statutes similar to those just considered, and the court, in *Bartlett v. Pentland*, 1 Barn. & Adol. 704, (1831), ruled that the act of Parliament should have been suggested on the record so that any stockholder might have the right to defend; and in *Clawes v. Brettell*, 10 M. & W. 506, (1842), the court held that before the property of the stockholder could be subjected to an execution issued against a corporation, a *scire facias* must first be issued, so that the stockholder might have a hearing, and that any point in the act of Parliament that might be raised might be decided.⁸⁷

* In *Brown v. Trail*, 89 Fed. 641 (1898), Morris, J., the plaintiff recovered judgment against a corporation in Kansas and brought action against citizens of Maryland, stockholders of the same, to enforce their individual liability under the Kansas statute. The court held that the defendants can deny that they are stockholders or show some other cause why they are not liable in this action, but they could not deny the validity of the judgment. To the same effect see *Came v. Brigham*, 39 Me. 35 (1854).

* See also *Ripley v. Sampson*, 10 Pick. 371 (1830), Shaw, C. J. In *New England Commercial Bank v. Newport Steam Factory*, 6 R. I. 154 (1859), Ames, C. J., the court held that while the estate of the deceased stockholder cannot be made subject to this liability at common law this can be done by filing a bill in equity, all the living stockholders being made parties to the bill, as interested parties.

" In *Byers v. Franklin Coal Co.*, 106 Mass. 131 (1870), Morton, J.,

8. *Practice in Pennsylvania under the act of 1849 and the acts following it.*

In Pennsylvania the act of 1874 following the provision of the act of 1849 declares that in any action at law or in equity instituted by a creditor of the corporation, who is entitled within this act to enforce the individual liability of the stockholders, he may include as defendants any one or more of the stockholders of the said corporation. On judgment being recovered, execution should first be levied on the goods of the corporation in the county where its chief business is. In case no sufficient property is found in such county to satisfy this judgment, then the property of such stockholders as were joined in the above suit shall be levied on, provided that the action is brought six months after the right of the creditor accrued.

In *Hoard v. Wilcox*, 47 Pa. 51, (1864), Thompson, J., A., a creditor of the X. manufacturing corporation, brought an action of assumpsit against several stockholders of X. to enforce their individual liability under the act of 1849, having previously recovered a judgment against the corporation and levied execution, which was unsatisfied. The court held that the statute provided that the action must be brought either against the corporation or against the corporation and some of the stockholders. Therefore, this suit cannot be maintained because the corporation was not joined as a party.

In *Mansfield Iron Works v. Wilcox*, 52 Pa. 377, (1866), the record in the case, just considered, was amended in the lower court by adding "Mansfield Iron Works," to correspond with the parties. The company pleaded former recovery. A verdict was rendered for the plaintiff, the court refusing to instruct the jury that a former recovery against the company would bar a recovery in this action. *Held* that there was no error. To deny a recovery in this suit, the court said, would be a denial of justice; but, the court added,

the court held, that where the plaintiff has taken judgment against the corporation so that he could not summon the stockholders as required by statute in order to subject their property to be levied in the manner described, he may maintain a bill in equity against these stockholders.

it must be understood that hereafter a suit must in the first instance be brought against the corporation and those stockholders whom the creditor desires to hold liable. This practice, the court said, is illogical and inconvenient, but they are trying to follow the statute as nearly as possible.

In *Youghiogeny Shaft Co. v. Evans*, 72 Pa. 331, (1872), Agnew, J., an action of assumpsit was brought against a certain corporation, and A. and B., its president and secretary, as joint promissors. When the case came to the Supreme Court on error counsel on behalf of the plaintiff contended that this action was brought to hold A. and B. liable under the statute. The court held that as no such purpose appeared on the record and no point was made at the trial as to the liability of A. and B. as stockholders, this action cannot, at the present stage, be maintained on that ground.

9. *Suit at law or in equity.*

Where the statute provides the procedure, then, as has been said, that procedure must be followed to the exclusion of all others. But where the statute creating a liability does not name the procedure or where the procedure is named, but the remedy is being enforced in another jurisdiction where the procedure named in the statute is not binding,³⁸ the question arises, in what form shall the remedy be enforced. It seems that a suit at law by the individual creditor against the individual stockholder or a bill in equity by all the creditors against all the stockholders are the two possible ways of proceeding under these statutes.³⁹ Which of the two shall be chosen depends, according to the decisions, on the peculiar phraseology of the statute creating the liability.

On principle, a suit at law should be the appropriate

³⁸ See *First Nat. Bank v. Gustin Minerva Mining Co.*, 42 Minn. 327 (1890). But in *May v. Black*, 77 Wis. 101 (1890), Orion, J., the court held, that where a Michigan statute provides for an individual liability of the stockholders of certain corporations which is to be enforced by an action of assumpsit, a suit in equity will not lie in the State of Wisconsin, but assumpsit is the only appropriate remedy.

³⁹ In *Adkins v. Thornton*, 19 Ga. 325 (1856) and *Bird v. Hayden*, 1 Robert [N. Y.] 383 (1863), the court held that where the statute does not provide the form of enforcing this liability the creditor may sue either in law or in equity.

remedy unless the statute shows a contrary intention. Creditors of a partnership can maintain a suit at law against the partners, only all the partners must be joined, and a failure so to join them can be taken advantage of by a plea in abatement. As the stockholders are made severally liable by these statutes under consideration, with a very rare exception, there can be no reason why an individual creditor could not maintain a suit against an individual stockholder.

Accordingly in *Flash v. Conn*, 107 U. S. 37, (1883), Woods, J., the court held that where the statute provides that stockholders shall be individually liable to the creditors of the company to an amount equal to the stock held by them respectively, an action at law will lie by a creditor of the company against a stockholder to enforce this liability. A rule was laid down by the court, viz: that where the liability of the stockholder is in proportion to the stock held by him, each stockholder being liable only for his proportion of the debt, then, as such a proportion can be ascertained only in equity, a creditors' bill in equity is the only remedy; but if his liability is not made to depend upon the amount of the liability of the other stockholders, a suit at law is the only remedy. In accord with this decision is *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473, (1840), Nelson, C. J., where the court held that an action at law will lie to enforce the liability under the statute which provides that, for all the debts due by the corporation at the time of its dissolution, the persons then composing it shall be personally liable to the extent of their respective shares of stock.⁴⁰

It must be understood that to avoid a multiplicity of suits against each individual stockholder a creditors' bill in equity may, at the option of the creditors, be filed.⁴¹ But see *Pat-*

* See also *Simonson v. Spencer*, 15 Wend. 548 (1836); *Larrabee v. Baldwin*, 35 Ca. 155 (1868); *Grund v. Tucker*, 5 Kans. 70 (1869); *Windham Savings Inst. v. Sprague*, 43 Vt. 502 (1871); *Norris v. Johnson*, 34 Maryland, 485 (1871); *Thompson v. Nicolai*, 49 N. Y. Supp. 422 (1897). In *Culver v. Third National Bank*, 64 Ill. 528 (1871), the court held that an act creating such liability creates a legal right recognizable at law, and an action at law will be maintained.

⁴¹ *New York Life Insurance Co. v. Beard*, 80 Fed. 66 (1897); *McDon-*

terson v. Lane, 35 Pa. 275, (1860), Read, J., where the court held that, where the statute provides for a remedy at law, a creditor's bill will not lie.⁴²

In *Terry v. Little*, 101 U. S. 216, (1879), the court laid down the principle that if the liability created is not a liability to the creditors, but for the indebtedness of the corporation, an action at law cannot be maintained; but if the liability be created directly to the creditors, such an action must be upheld. In other words, where the statute declares that the stockholder shall be liable for the debts of the corporation, the court says, that thereby is shown an intention on the part of the legislature that a fund be created for satisfying the debts of the corporation. To this fund all the creditors, therefore, have an equal right, and so one creditor cannot get payment of the fund to the exclusion perhaps of all the other creditors, but each creditor has a right to a share of this fund according to the proportion that his debt bears to the whole indebtedness of the corporation. This proportion can be ascertained only by a creditors' bill in equity. Hence a suit at law will not lie. But where the statute declares that the stockholders shall be liable to the creditors of the corporation, an intention of the legislature is thereby shown to give each individual creditor a right to enforce this liability for his own benefit, irrespective of the other creditors, and so a suit at law will be maintained.

This principle in both its branches is perfectly well settled in the Federal courts and in many of the state courts.⁴³

nelt v. Ala. Insurance Co., 85 Ala. 401 (1888). But in *Hale v. Morrison* decided June 11, 1900, in the Federal Court for the Eastern District of Pennsylvania the court held, that a bill in equity will not lie to avoid a multiplicity of suits. In *Mfg. Company v. Bradley*, 105 U. S. 175 (1881), Matthews, J., the court held that where a statute creates a liability against the stockholders unlimited, except in the amount of the debt of their corporation, and it prescribes no form of action, equity and law have concurrent jurisdiction, and a bill in equity will be maintained.

⁴²In *Kennedy v. Gibson*, 8 Wall. 498 (1869) and *Casey v. Galli*, 94 U. S. 673 (1876), the court held that where the whole liability of the stockholders is required to pay all the debts of the corporation the proceedings must be at law. See also *Hale v. Morrison* (1900) (*supra*, note 41).

⁴³*Coleman v. White*, 14 Wis. 700 (1861); *Pollard v. Bailey*, 20 Wall.

As has been already pointed out, the suit at law must be by an individual creditor against an individual stockholder, for the sole benefit of the former. A joint suit against two or more stockholders cannot be brought under most statutes, as the liability is made several and not joint.⁴⁴

It might be added that in case a debt, so enforced, is paid by the stockholder against whom it is enforced, he is entitled to contribution from the corporation and all the other stockholders, and can enforce this right in equity. In *Erickson v. Nesmith*, 46 N. H. 371, (1866), Sargent, J., a bill was filed by the creditors of X., a corporation of the state of New Hampshire, against the stockholders of the same, to enforce their individual liability under a statute. The court used the following language:

"The rule for contribution among partners is well settled. If, after applying the assets there are still outstanding liabilities, the partners must contribute in proportion to their shares, and if, on the other hand, a surplus remains, it will be distributed among them in like proportion. . . . Applying these principles to the case before us, the decree should be entered on all the stockholders of the corporation, each stockholder paying the same proportion to the whole debt, as the amount of his stock or number of his shares bears to

520 (1874); *Fidelity Insurance Co. v. Mechanics National Bank*, 97 Fed. 297 (1899). In *Harper v. Union Mfg. Co.*, 100 Ill. 225 (1881), Dickey, J., the court held that under the statute making the stockholders liable for all debts entered into by the corporation prior to the payment of all the stock subscribed, the proper remedy is in equity, as "to the creditors" means "to all the creditors." In *Harris v. Dorchester*, 23 Pick. 112 (1839), Morton, J., the court held that under a statute imposing a personal liability upon stockholders of a bank in case of any deficiency arising through the mismanagement of its officers, suit must be in equity. In *Wright v. McCormack*, 17 Ohio St. 87 (1866), White, J., it was held that under a statute imposing a liability on the stockholders of a corporation "for the purpose of securing the creditors of such company" a bill in equity is the only remedy.

"*Terry v. Little*, 101 U. S. 216 (1879). In *Wright v. McCormack*, 17 Ohio St. 87 (1866), White, J., the court held that when a bill in equity against the stockholders of a corporation had been instituted by a part of the creditors for the benefit of all the creditors, no creditor can thereafter maintain a suit at law against all the stockholders or any of them, to enforce this liability for his own benefit.

the whole amount of stock or number of shares in the corporation, subject to the qualification on account of non-resident and insolvent stockholders."⁴⁵

Where the statute itself provides for a method of enforcing contribution, however, that method must be pursued. In Pennsylvania, the statute provides that in case a debt is recovered by a creditor against a stockholder, the judgment which the creditor had recovered against the corporation as a condition precedent to his pursuing his remedy against the stockholder should be assigned to such stockholder who is to enforce it, first against the corporation, and then ratably against the other stockholders. The court in *Brinham v. Wellersburg Coal Co.*, 47 Pa. 43, (1864), Agnew, J., held that a bill in equity will not lie for contribution, as there is an adequate and complete remedy provided by statute. And in *O'Reilly v. Bard*, 105 Pa. 569, (1884), Clark, J., the court held that assumpsit will not lie to enforce this contribution, as the statute provided a remedy, and that remedy excludes all others.

Where the action is in equity it must be brought by all the creditors or by less, in behalf of all.⁴⁶ The debtor corporation is made a party defendant;⁴⁷ so also are all the stockholders, or some adequate reason must be shown why all the stockholders were not joined, as that they are out of the jurisdiction or are insolvent.⁴⁸ A pro rata contribution from all the stockholders in proportion to their stock, sufficient to satisfy all the creditors who are entitled to the benefit of the statute, is decreed, provided, of course, that such a con-

⁴⁵ In *Andrews v. Callender*, 13 Pick. 484 (1833), the court held that members of a corporation voluntarily paying a debt of the corporation for which they are made liable by these statutes without any order of court, have no right of contribution from the other stockholders. In *Sayles v. Brown*, 40 Fed. 8 (1889), Morris, J., certain stockholders of a Rhode Island corporation having been compelled, by order of court, to pay the debts of the corporation, filed a bill against other stockholders of the same, residing in Maryland, for contribution. The court held, that because the statute was penal and so was not enforceable in Maryland, contributions will not lie.

⁴⁶ *Crease v. Babcock*, 10 Metc. 525 (1846).

⁴⁷ *Booth v. Dear*, 96 Wis. 516 (1897).

⁴⁸ *Erickson v. Nesmith*, 46 N. H., 371 (1866).

tribution does not exceed the limit of the stockholders' liability. This fund is to be shared ratably by all the creditors who have brought themselves within the provisions of the statute.

In conclusion we desire to repeat that the liability under the statutes considered in this treatise is a partnership liability, and is governed by partnership principles, except where the statute provides otherwise. It results from this principle that the stockholders cannot maintain an action against each other to enforce this liability. Also a set-off should not be allowed when a stockholder is sued individually under these statutes, no more than, when a partner is sued by a creditor of the partnership, he could set-off a debt due him from the partnership. The statute of limitations should begin to run against the stockholder at the same time as against the corporation. This liability is created for the benefit of the creditors of the corporation, and they alone can enforce it, so that the appointment of a receiver of the debtor corporation will not bar a suit by a creditor against the stockholder on this liability. The law seems to be settled that a *bona fide* transfer of his stock in the corporation will relieve the transferor from this liability as stockholder of that corporation, and that the corporation loses none of its rights and privileges as a corporation, from the mere fact that its members are made liable as partners.

Samuel M. Israeli.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

BANKRUPTCY.

In re Blair, 102 Fed. 986, decides, (1) that where a creditor collects his debt by judgment and execution within four months prior to the debtor's bankruptcy, such collection does not amount to a preference unless the creditor has reason at the time to believe that the debtor is insolvent, and (2) that the court of bankruptcy has no jurisdiction to entertain an action by the trustee to recover back such money, but the trustee is relegated to his action in the state court. The latter part of the decision is of course in line with *Bardes v. Bank*, 20 Sup. Ct. 1,000, although the latter case had not been decided at the time.

Under the Bankruptcy Act of 1898, in order to support a petition for involuntary bankruptcy, it is necessary that the petitioning creditor possess a provable debt at the moment the act of bankruptcy is committed. In *In re Brinckmann*, 103 Fed. 65, the petitioner obtained a verdict in tort against the alleged bankrupt on January 13, 1900, and on January 29 judgment was entered upon the verdict. The alleged act of bankruptcy was committed on January 15. Judge Baker of the District Court (D. Ind.) dismissed the petition, on the ground that the petitioner's claim was not liquidated until the moment of judgment; therefore he did not possess a provable claim at the time the act of bankruptcy was committed.

BANKS AND BANKING.

In *De Weese v. Smith*, 97 Fed. 309, Judge Phillips of the District Court (D. Mo.) decided that when the Comptroller of the Currency has levied an assessment for any amount, no matter how small, against the stockholders of an insolvent national bank, his power is exhausted, and he may not levy a second assessment. The decision was strongly criticised in 39 AM. LAW REGISTER (N. S.) 185, and in *Aldrich v. Campbell*, 97 Fed. 663, the Circuit Court of Appeals for the Ninth Circuit,

BANKS AND BANKING (Continued).

reached the opposite conclusion from that of Judge Phillips. Now that the Circuit Court of Appeals for the Seventh Circuit has adhered to the result reached by the Ninth Circuit—*Studebaker v. Perry*, 102 Fed. 947—we may regard the question as practically settled.

In *Schuler v. Citizens' Bank*, 82 N. W. 389, an attachment execution was levied upon a bank deposit, and on the trial, the bank offered to prove that it held a note of the depositor, due subsequent to the service of the attachment, and that the depositor had authorized it to apply the deposit to the payment of the note. The evidence was objected to on the ground that it tended to add to and vary the terms of the note, but the Supreme Court of South Dakota sustained its admission on the ground that the depositor had constituted the bank his agent to make the application. In Pennsylvania and many states the courts would not be obliged to go so far for an excuse to admit the evidence.

CONFLICT OF LAWS.

In *Clardy v. Wilson*, 58 S. W. 53, which was an action in a court of Texas, it became necessary to prove the married women's law of Tennessee. A Tennessee lawyer testified that the common law prevailed in that state, except in so far as it had been modified by statute. This was all the evidence upon the subject. The Court of Civil Appeals, of Texas, decided that the evidence was insufficient to overcome the presumption that the law of Texas, and not the common law, upon the subject of married women prevailed in Tennessee. The decision is scarcely satisfactory, for, if the court believed the evidence, it was bound to assume the existence of the common law in Tennessee, in the absence of statutes; and the court certainly could not infer the existence of statutes changing the common law without proof of the same.

In *Brunswick Co. v. Bank*, 99 Fed. 635 (noted in 39 AM. LAW REGISTER, N. S. 487), the Circuit Court of Appeals (Fourth Circuit), decided that where an action was brought in Maryland to enforce the individual liability of a Maryland stockholder in a Georgia corporation under a Georgia statute, the Georgia statute of limitations and not that of Maryland applied. *Coxe, J.*, of the Circuit Court (N. D. N. Y.), adopted the opposite view, hold-

Application of
Deposit to
Payment of
Depositor's
Note

Proof of
Foreign
Law

Stockholder's
Liability,
Statute of
Limitations

CONFLICT OF LAWS (Continued).

ing that in one of the numerous suits, which have been brought all over the country to enforce the individual liability of stockholders in Kansas corporations, the statute of limitations of the forum controls the liability: *Seattle Nat. Bank v. Pratt*, 103 Fed. 63.

CONSTITUTIONAL LAW.

It will be remembered that in *Ex Parte Ortiz*, 100 Fed. 955, Judge Lochren, of the District Court of Missouri, wrote a lengthy opinion (all of which was dictum) to the effect that, immediately upon the ratification of the treaty between the United States and Spain, the provisions of the Constitution of the United States extended *ex proprio vigore* to Porto Rico. Now, Judge Townsend, of the Southern District of New York, announces the opposite view, that it requires congressional action to extend the Constitution there: *Goetze v. U. S.*, 103 Fed. 73. The question involved was whether or not the inhabitants of Porto Rico were, after the treaty, inhabitants of a "foreign country" within the operation of the Dingley tariff act of 1897. In holding that they were subject to the tariff, Judge Townsend relied especially upon the clause of the treaty providing that the "civil rights and political status" of the inhabitants should be determined by Congress, but he expressed his opinion strongly that, even in the absence of such a provision, it would require the authority of a treaty or act of Congress to invest the inhabitants of Porto Rico with any rights under the Constitution.

COURTS.

Within the past month two state courts have decided an important point of Federal practice, which demands a ruling by the Federal courts. When a suit has been removed from a state court into a Federal court, where a voluntary non-suit is suffered, or the case is dismissed otherwise than upon the merits, may another suit be brought in the state court upon the same cause of action? The question was answered in the affirmative by the Court of Appeals of Kansas in *Swift v. Hoblawetz*, 61 Pac. 969, and by the Supreme Court of Georgia in *McIver v. Florida, etc., Rwy. Co.*, 36 S. E. 775. In the latter case Simmons, C. J., and Little, J., dissented, on the ground that the removal operates to remove not only the suit, but also the cause of action, so as to permanently divest the state court of jurisdiction. *R. R. v. Fulton* 53 N. E. [Ohio] 265, supports the dissenting view.

Removal to
Federal Court,
Dismissal,
Effect

CRIMINAL LAW.

Criminal codes are so extensive nowadays that we rarely hear of a conviction under the common law. But such cases occur. In *Thompson v. State*, 58 S. W. 213, an indictment was brought, under the common law, for an attempt to dispose of the dead body of a pauper for gain. The Supreme Court of Tennessee sustained a conviction, on the ground (1) that the sale of a dead body was a misdemeanor at common law, and (2) that, since it was considered to be *malum in se*, and not merely *malum prohibitum*, an attempt to commit the crime was a misdemeanor.

Following *Comm. v. Waldman*, 140 Pa. 97, the Court of Criminal Appeals of Texas has decided that the business of shaving is not a work of charity or necessity within the generally prevalent exception to the Sunday laws: *Ex parte Kennedy*, 58 S. W. 129. However the court concedes, "that there may be isolated cases which would suggest the necessity for a tonsorial artist," such as "shaving a corpse."

DAMAGES.

The Code of Alabama (§ 26) provides that when the death of a minor child is caused by the negligence of any person or corporation, the parents or personal representative of the child may recover from the wrongdoer "such damages as the jury may assess." The Circuit Court of Appeals (Fifth Circuit) decided that, under this statute, punitive as well as compensatory damages could be recovered: *McGhee v. McCarley*, 103 Fed. 55. Pardee, J., wrote a strong dissenting opinion to the effect that the statute limited the defendant's liability to compensatory damages.

DEEDS AND MORTGAGES.

The Federal revenue act of June 13, 1898, provides that where a stamp is omitted from a document without fraudulent intent, the document may be rendered valid by a subsequent stamping. Under such circumstances does the validity of the instrument date from the stamping or from the date of its execution? This question was presented in *Wingert v. Ziegler*, 46 Atl. 1075, where the question arose as to the validity of a sheriff's sale upon an assigned mortgage, it appearing that the stamp had been originally omitted from the assignment by inadvertence, and that its place had not been supplied until after the sale.

DEEDS AND MORTGAGES (Continued).

The Court of Appeals of Maryland held that the evident intent of Congress was to provide for the validity of the instrument from the date of its execution; therefore the sale was upheld.

EQUITY.

Where the legislature has provided a remedy through the attorney-general, by which wrongs to the public through the violation of corporate charters may be redressed, the remedy is exclusive, and a member of the community may not obtain an injunction to prevent such violation of the charter. Thus, in *McNulty v. Brooklyn Heights Rwy. Co.*, 66 N. Y. Suppl. 57, the Supreme Court of New York refused to grant the plaintiff, a member of the public using the railway, an injunction to restrain the railway from charging a greater rate of fare than that allowed by its charter, since the plaintiff did not suffer any greater damage than the rest of the public.

INSURANCE.

It is well settled that a fire insurance company, upon paying a loss, becomes subrogated to the rights of the insured as against one who is responsible to the insured for the loss; wherefore it results that if the insured releases the tort-feasor from liability toward himself, he may not recover from the insurance company. In *Packham v. German Fire Ins. Co.*, 46 Atl. 1066, the fire which was caused by the negligence of a gas company, destroyed property of the insured, in addition to that portion of his property covered by his policy with the insurance company. The insured brought an action of tort against the gas company, in which it was agreed that the value of the insured property should be deducted from the verdict. In an action by the insured against the insurance company, the Court of Appeals of Maryland decided that, as the insured was barred from bringing further suit against the gas company for the value of the insured property, he could not recover from the insurance company, since he had deprived the insurance company of its right of subrogation against the gas company. Under precisely the same facts, an opposite conclusion was reached in *Ins. Co. v. Fidelity Co.*, 123 Pa. 523.

NEGLIGENCE.

In volume 101 of the *Federal Reporter* we have the unusual spectacle of two Circuit Courts of Appeals coming to precisely

NEGLIGENCE (Continued).

Fire from Locomotive Sparks, Presumption the opposite conclusions upon the same point of law. *McCullen v. Chicago, etc., Rwy.*, 101 Fed. 66, decided by the Eighth Circuit, holds that the fact that a fire is caused by locomotive sparks raises a presumption of negligence on the part of the railroad company, while *Garrett v. Southern Rwy.*, 101 Fed. 102, supports the opposite view. And this is not a case where the Federal courts apply the law of the locality, but, in defiance of reason and of a proper construction of the Judiciary Act, hold that cases of negligence by railroads present questions of "general commercial law," and that the Federal courts may decide them as they please, irrespective of the state decisions.

RAILROADS.

Ever since the case of *Penna. R. Co. v. Montg. Co. Rwy. Co.*, 167 Pa. 62, it has been well settled in Pennsylvania that where **Construction of Railway Without Authority** a street passenger railway company, incorporated under the Act of May 14, 1889, attempts to lay its track along a public road without having obtained the consent of the abutting property owners, any such owner may restrain the construction by an injunction. But if the property owner delays action until the railway has been constructed, his right to an injunction is barred, and he is relegated to his action for damages: *Becker v. Lebanon, etc., Rwy. Co.*, 188 Pa. 484. In the latter case the plaintiff, having been refused the injunction, attempted to get rid of the railway by an action of ejectment. But the Supreme Court of Pennsylvania decided that the railway, having been constructed, was there to stay, and that the only remedy of the plaintiff was an action of trespass to recover damages for the increased servitude upon his land: *Becker v. Lebanon, etc., Rwy. Co.*, 46 Atl. 1096.

WILLS.

The modern tendency is to limit greatly the rule which allows precatory words in a will to be used as the basis of a **Precatory Words to Create Trust** trust. Thus in *Marti's Estate*, 61 Pac. 964, the testator gave his property to his wife absolutely. The gift was followed by the clause: "Upon the death of my wife, I desire that one-half of the property bequeathed to her shall be devised by her to my relatives." The Supreme Court of California decided that, under the circumstances, the word "desire" did not import a command, and therefore no trust was created.

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TREASURER.

CONTRACT—VALIDITY—TRUST—TESTAMENTARY DISPOSITION.
—*Sullivan v. Sullivan*, 56 N. E. (N. Y.) 116. February 6, 1900. On
October 10, 1892, Catharine Sullivan deposited in the Chemung Na-
tional Bank \$2,000, and received the following certificate, in part:
"Catharine Sullivan has deposited in this bank \$2,000, payable one day
after date to the order of herself, or in case of her death to her niece
Catharine Sullivan, of Utica, upon return of this certificate." She
retained this certificate, and on her death, which occurred shortly
after, it was found among her papers. An action was brought by
her administrator first against the bank, then against the beneficiary.
The defendant Catharine based her claim, first, on the rule which
in some cases gives a third party to a contract the right to enforce
it; second, on the ground that a valid trust was declared in her
favor. It was clearly shown in the trial court, that the depositor
had no intention to create a trust during her life. She informed the

teller she wanted the sum fixed for herself during her life, and in case of her death to her niece, Catharine Sullivan of Utica.

On both principles the Court of Appeals discussed its own decisions alone, and decided in accord with the general current of authority. In regard to the argument that the defendant was entitled to the fund as the beneficiary of a contract between the depositor and the bank, the court said this case lacked both of the two elements which permitted such a claim to be sustained, under the New York rule. If there had been a near blood relationship, as of husband and wife, or parent and child, between the promisee and the beneficiary, or a pre-existing debt the claim would have been good.

In *Dutton v. Poole*, 2 Levinz 211, (1677), was first laid down this departure from the strict principles of contract. There A. made a promise to his father for the benefit of his sister. It was held the sister could recover. Though this decision was given by a divided court, and was definitely repudiated in *Tweedle v. Atkinson*, 1 B. & S. 393, (1865), the New York Court has extended it to other cases. Where A. owes B. \$1,000, and C. borrows this money from A. promising to pay B., the latter can recover. *Lawrence v. Fox*, 20 N. Y. 268, (1859). This is the leading case in New York, and under its principle a recovery is allowed if there exists "first an intent by the promise to secure some benefit to the third party and secure some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise or an equivalent from him personally. A mere stranger cannot intervene and claim by action the benefit of a contract between the other parties. There must be either a new consideration or some prior right or claim against one of the contracting parties by which he has a legal interest in the performance of the agreement." See Ashley "Cases on Contract."

Even this is a narrow statement of the general doctrine throughout the western states, and in the federal courts. It has been laid down in many cases that if there is a clear intention to benefit directly the third party, he can recover. Nothing is said about the necessity of a pre-existing debt. It is well to state, however, that this broad principle is with few exceptions applied to cases whose facts show the pre-existing debt and therefore come within the New York doctrine. See note page 280, Hufschmidt's *Anson on Contracts*; *Nat. Bank v. Grand Lodge*, 98 U. S. 123, (1878); *Hendrick v. Lindsay*, 93 U. S. 143, (1876). Some states give a statutory right of recovery, *Stimson Amer. Stat. Law*, §§. 4117, 4128. Massachusetts follows the rule which is now well settled in England under *Price v. Easton*, 4 B. & A. 433, (1833); see *Exchange Bank v. Rice*, 107 Mass. 37, (1871). Also see as to rule in Michigan, *Linneman v. Moross*, 98 Mich. 178, (1893).

The theory of *Dutton v. Poole* was supported in two late New York cases, one of which has given rise to harsh criticism, *i. e.*, the case of *Buchanan v. Tilden*, 158 N. Y. 109, (1899). In this case the judge thought the relationship of husband and wife sufficient ground to maintain the action. He took the strange ground that

such a relation made a good consideration for the promise, and that a husband was at all events bound to maintain his wife properly. A. agreed with B. to pay B.'s wife \$50,000. *Held*, B.'s wife could recover, one ground being that B. ought to provide for his wife, thus giving her an equitable right to sue. See *Todd v. Weber*, 95 N. Y. 181, (1884).

In the present case the defendant's father was a nephew of the intestate, and had been given a home by her, and treated as a son, but never legally adopted. The intestate had always shown great affection for the defendant. In the eye of the court such relationship was not equivalent to that shown to exist in the preceding cases, and the defendant's contract right was denied.

The defendant argued next that the circumstances of the deposit were sufficient to make either the bank or the depositor a trustee, leaving to the donor a power of revocation. The court answered, conclusively, this contention by pointing out that the depositor only intended to establish a debtor and creditor relation. The terms of the certificate and the evidence in the trial court, proved that no right in *presenti* was to pass to the defendant. The words of Jessel in *Richards v. Delbridge*, L. R. 18 Eq. 11, (1874), are in point: "The true distinction appears to me to be plain and beyond dispute; for a man to make himself a trustee there must be a clear expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another and not retain it in the donor's own hands for any purpose, fiduciary or otherwise." Hence this was no trust; it was no gift because it could not take effect until after death. Being a testamentary disposition it did not satisfy the provision of the statute and was, in that sense, also invalid. It must be noted that in this case no declaration of trust was made. If such had been the fact even without notice to the defendant a good trust would have been created. There is Massachusetts's case to the contrary, *Clark v. Clark*, 108 Mass. 522, (1871). Here was a deposit accompanied by an express declaration of trust. The deposit book was retained by the depositor and no notice was given to the beneficiary. *Held*, no trust, the decision being based on *Brabrook v. Boston Bank*, 104 Mass. 228, (1870). But in this latter case and in other English and American cases of the same character, there was no intention to create a trust. The declaration of trust was made merely to evade bank laws limiting the amount of deposits to the credit of one person. The state of English law on this subject is well shown by *Field v. Lonsdale*, 13 Beav. 78, (1850). An act of parliament limited deposits. A. deposited in his own name, and afterward opened a new account in trust for his sister. The following argument was used by counsel and adopted by the court: "When he could no longer, under the act, deposit any further moneys in his own name, he opened a new account in the name of his sister, intending it no doubt for his own benefit. A resulting trust is always presumed in such cases."

The cases represented by *Clark v. Clark* are few in number, and lay down an unreasonable rule. The courts regard, fundamentally, the intention. When the intention to create the trust is clear, it will

be upheld, whether notice is given to the beneficiary or not. And once created it is complete and irrevocable.

As stated before it was argued by the defendant that this was a trust with a power of revocation. Such a trust was upheld in *Von Hesse v. Mackaye*, 136 N. Y. 114, (1892). Bonds were given in trust. The word "trust" was used, also "said bonds for and during the life of A. to be subject to his order." Several bonds were taken back by the donor. *Held*, a valid trust in the absence of creditor's claims. This power of revocation must be very clearly proved. It will not be implied without strong evidence. In *Fellow's App.*, 93 Pa. 470, (1880), it was shown that the grantor of lands in trust, reserved an interest during life in the proceeds of the property and gave a benefit in future to others. No power of revocation was implied but the trust was deemed complete.

BOOK REVIEWS.

GREENLEAF ON EVIDENCE, SIXTEENTH EDITION. Edited by JOHN H. WIGMORE. Vol. I. Boston: Little, Brown & Co., 1899.

The AMERICAN LAW REGISTER has already published some paragraphs of this latest edition of Professor Greenleaf's book, in the form of an article by Professor Wigmore, entitled "One View of the Parol Evidence."

The writer of this article therein suggests that the so-called "Parol Evidence" Rule does not really concern the doctrine of evidence, but simply declares certain things which might otherwise be proved, to be legally immaterial for some reason of substantive law. It is a doctrine imposing restrictions upon the sort of data that are to be considered as effectively supplying the terms of the legal act—that act's terms having been reduced to a single memorial by a process of integration.

This article appears in the text of Mr. Wigmore's Greenleaf at pp. 434, *et seq.*, under the head "Another View of the Parol Evidence Rule," immediately following the original sections on the subject, and we refer to it to illustrate the manner in which the present edition has dealt with the text. Up to this time the work has run through fifteen editions without any substantial alteration of the text, but Professor Wigmore has found a different treatment necessary. As he says in his preface, statutory changes, development of doctrines and new applications require additions too cumbersome for notes, and the requirements of a practical treatise have made it desirable to omit portions of the text which no longer state the law. Moreover the editor has found it necessary in many instances to transpose the original sections in order to remedy errors in the order of treatment. All omitted sections have been placed in an appendix, and matter inserted is indicated by brackets, the system of numbering and lettering the sections being such that the reader can readily refer to the original text and ascertain the original arrangement, while at the same time having the advantage of the more modern form and an unbroken text made up of current law.

Much more than the space gained from omissions from the original text has been taken up by three entire chapters (IV, V and XI), and more than a hundred new sections added by the present editor. Some fifteen thousand cases are cited, covering, in a large number of questions having particular interest, all the available authorities.

Of the chapters inserted entire from Mr. Wigmore's own pen, Chapter IV deals with Real Evidence—the presentation of the object itself for the personal observation of the tribunal called by him "Optic Preference;" Chapter V treats of Circumstantial Evidence as bearing on the subject of Relevancy, and Chapter XI with the exceptions to the hearsay Rule formed by evidence of regular book

entries made in the course of business. The treatment of the subject-matter of these chapters is clear and concise and the citation of authorities ample.

Among the portions (not comprising whole chapters) inserted by Mr. Wigmore, particular attention may be called to the discussion of the so-called "Best Evidence" Rule, Sections 97a, *et seq.* He there points out that the oft-quoted principle "that one must bring the best evidence that he can," while perhaps once useful as a general principle, cannot now be regarded as a fixed rule, as it is not true to the facts and does not hold out in its application; and that in so far as it does apply, it is unnecessary and uninstructive. "It is roughly descriptive," he says, "of two or three rules which have their own reasons and their own name and place and are well enough known without it." These sections clear up, in a brief and convincing manner, some of the obscurity which surrounds the subject in the minds of many practitioners and in not a few text-books and decisions, and together with the sections on the "Parol Evidence" Rule, above referred to, add much value to a work which has already stood the test of time. We understand that the book has already had a large sale and can recommend it alike to the student and to the practicing lawyer.

C. H. H.

BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked * will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, S. W. Cor. Thirty-fourth and Chestnut Streets, Philadelphia, Pa.]

- A SELECTION OF CASES ON CONSTITUTIONAL LAW.** By EMLIN MC-LAIN. Boston: Little, Brown & Co. 1900.
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THE PROPER PREPARATION FOR THE STUDY OF LAW.¹

The law has always been called a learned profession, but until recently no preparatory education was required of those who sought to enter it.

There were no examinations for admission to any law school prior to 1877, and as late as 1890 only one school had adopted admission requirements equivalent to the entrance requirements for admission to college. Indeed, in the last decade the majority even of fairly good schools had only that time-honored, but utterly useless check on unfit applicants—that they should be of “good moral character.” Of late, rapid progress has been made, though it is indeed true that if we look at the entrance requirements of our law schools, we will still find much to be desired. Thus of the eighty-four schools, the catalogues of which I have examined, no less than forty-six have no entrance requirements, though in many cases this fact is concealed by such empty phrases as: “No special literary qualifications are re-

¹Address delivered by Dr. William Draper Lewis at the Twenty-third Annual Meeting of the American Bar Association, held at Saratoga Springs, N. Y., August 29, 1900.

quired to enter this school."—"The applicant must be sufficiently advanced in education to comprehend the principles taught," or, "he must have a good English education." One school solemnly announces that the applicant "must be able to read;" others, however, say frankly that the only requirement is "to register one's name with the secretary." At the same time it must be remembered that a large number of the schools which are still without any entrance requirements, though in most instances nominally connected with universities and colleges, are really private proprietary schools, and that with two or three unfortunate exceptions, they are not connected with universities of any standing. The high sounding sentences which I have read are not so much evidences of charlatanry, as of the fact that the faculties of the schools are conscious that the profession expects them to save the bar from illiterate persons. On the other hand, thirty-eight schools do require the applicant to prove that he has at least some preparatory education; three, Harvard, North Carolina and Leland Sanford, Jr., Universities require a college degree, seventeen an examination equivalent to admission to the Freshman Class of a good college, and the remainder an examination which could be taken by those who have passed one or two years in an ordinary High School. Though, as I have said, there is still much to be desired, no one can look at the record of progress since 1890 and not perceive that the tendency among law schools is toward an increasing demand of a preparatory education in those who would take up the study of the law. A university law school is not now considered in good standing unless its entrance requirements are equivalent to the requirements for admission to its college department, and, while these requirements vary somewhat as between two or more universities, in any one university it prevents the law students and the law department from being regarded with contempt by the rest of the university.

But I do not believe that any of our university schools of law which now have admission requirements equivalent to the admission requirements of their colleges, will or ought long to rest content with this standard. Indeed I think I put the matter correctly when I say that there is a very general feeling at a number of universities that a higher standard of

admission is required, and that the student on entering the school which trains him for his special life work, ought to come to that work with a more liberal mental equipment than is indicated by the ability to enter on a collegiate course. Already another university—Columbia—has announced its intention to require, after the fall of 1902, a college diploma; while I know that in other universities the possibility of a similar requirement is being discussed.

Without criticising the step taken by Columbia, I cannot help regarding it as unfortunate that the present discussion regarding standards of admission among the better law schools seems to begin with, and to be confined to, the question: "Should we require a college diploma for admission?" It has always appeared to me that this is starting with what we may call a dependent question; that is, a question, the proper solution of which depends on the solution of another and much more fundamental question. It is indeed very natural that those of us who are connected with law schools now requiring a college entrance examination for admission should approach the question of increased entrance requirements by first discussing the desirability of requiring a college diploma; for up to this time all the standards of admission adopted have been standards of quantity not of quality. That is, we have always required the would-be student to pass examinations arranged by persons having no knowledge of law, the subjects themselves being selected without reference to any special requirements, if any there be, of the law student. Yet it would seem proper that before law schools require their students to attain a certain scholastic standard, especially when that standard involves as much time and labor as is represented by a college diploma, that the faculties should first ask themselves, whether the studies prescribed as necessary to obtain this degree by college faculties, are adapted to the work which is required of the law student. In other words, the first duty is to inquire what information, what kind of mental training, is necessary for one who would study law? We cannot expect a college faculty to investigate this question. Lawyers, and especially those who teach law, are alone qualified to decide the best mental training of the would-be law student. If

we do not decide the question no one will decide it for us. After we have determined what training the prospective student of law should have, then, and not till then, can we intelligently take up the question where the education we desire can best be obtained, and what evidence law schools should require of the man who comes to them to study law, that he is prepared for his work. In short, we have first to answer the question "What is the proper preparation for the student of law?" before we can take up such a secondary question as the wisdom of requiring a college diploma for admission to our law school; and the primary object of this paper is to discuss the first and more fundamental question.

How then shall we solve the problem of the proper preparation of the would-be student of law? Must we not first examine the character of the material on which the law student and the lawyer have to work, and the nature of the mental processes through which he must go in order to solve the real problems of that work? A preparatory education should seek to prepare the mind for the real work which the mind will be called upon to do. Stated in this way the proposition would seem, as I believe it to be, axiomatic. And yet it is a truth which we all need to keep constantly in mind, for nothing is more popular and plausible than what we may call the may-be-incidentally-useful idea in preparatory education. Every now and then something is recommended to the would-be law student from what is called a practical standpoint; shorthand is a good thing because quick notes may be taken in court; bookkeeping, because a client may want you to examine his books; Latin, because the student will find the names of writs and some of the maxims of the law expressed in that language; government, because perchance as a lawyer he may go into politics. What makes such suggestions all the more plausible is that we all must admit that the reasons advanced are good reasons. It is true that shorthand aids us in the taking of notes; that in many cases a knowledge of bookkeeping is an assistance to a lawyer, and that if one knows Latin he will find no difficulty in extracting the meaning from a legal maxim expressed in Latin. The real trouble with all such suggestions is that they lose sight of the fact that education is always a choice of goods, not a choice be-

tween good and evil. It takes time to acquire knowledge. We have only one life to live. That which is not the best expenditure of time is a poor expenditure of time. While we may admit the incidental usefulness of shorthand or bookkeeping to a lawyer, in contemplating a proper course preparatory to law, one should first try to determine not the knowledge which is incidentally useful, but the training which is essential in order that the mind may grasp the real problems of the law. That these problems are not the rapid taking of lecture notes, the keeping of books or the correct translation of the Latin names of writs, it is unnecessary to point out. Indeed, when we consider the amount of time necessary to acquire even a superficial knowledge of Latin, to hear a lawyer advocate the expenditure of this time by the would-be law student on the ground that it will enable him to translate the occasional snatches of old-time pedantry found in the reports, would be laughable, if it did not indicate a total lack of any real thought on legal educational matters.

Turning to the work of the lawyer, we find first that the materials with which he has to deal are the facts of his clients' cases, and the recorded decisions on facts more or less similar to the cases which his clients bring to him. This material is all social material; that is, it relates to men in society, their relations to one another and to their property. The particular instances or cases of the law are all records of human actions and the obligations which result from those actions. From this material the worker in the law must induce his principles, and deductively apply them to the facts of the particular case before him. That legal principles are inductions from particular instances is not peculiar to the law. This is also true of the principles of all other sciences. Neither is it peculiar to the law that the material on which the student works is not identical with the material of any other science. Each science has its own peculiar field of facts in which the devotee must work. What is peculiar to the work of the lawyer, however, is that his principles are rather expressions of tendencies than exact statements of universal truths. The laws of physics, of chemistry, of mathematics, are of universal application. This is never true of a

legal principle, no matter how carefully expressed. Take for example the proposition that a man is bound by his contract, or the proposition that he can do what he likes with his own, or that he is liable for the injuries he knowingly inflicts on others. None of these are universally true. Though of wide application they are nothing more than usually predominating tendencies, and the difficult legal work is the work on cases which apparently fall under two or more conflicting principles. Take the last two principles above stated: they both apply, but with opposite results, to the case of one who seeks redress for an agreement between two others not to sell to him. The difficulty of the proper decision is not in the induction from which the principles are obtained, or in the deduction which applies one principle admitting it to predominate, but in the "judgment of tendencies" which determines which principle in this case should predominate. Thus in addition to the inductive process by which the principle is derived, and the deductive process by which the lawyer applies the principle to his case, there is in every case of real difficulty a mental process to be gone through which involves a judgment as to which of two apparently opposing principles will predominate and govern the particular case to be decided.

If I have described properly the mental work required of the law student and lawyer, it would seem to follow that the kind of mental preparation which the law student primarily needs is that which will enable his mind to deal with legal material; to make inductions and deductions from that material, and, primarily to weigh tendencies; that is to say, to determine from among several principles which are applicable to the case, the particular one which should govern it. If this is the special mental training wanted, it does not require an extended investigation to ascertain that this training is not found in the study of mathematics, in the physical sciences, in biology, in literature, or in the study of modern or classical languages. The mathematician begins with assumptions which he regards as self-evident. Each step of his reasoning is demonstrably right or wrong. If probabilities enter into his work, it is only because physics, or chemistry, or astronomy, has failed to furnish him with abso-

lutely correct premises. Mathematics may have a value to all who use their brains in that it inculcates the necessity for careful deductions, but beyond this, for the work of the lawyer, it has no special significance. Physics and chemistry, besides the information they impart, train the hand and eye in the handling of certain classes of material things; but the classes of material on which the physicist and chemist work bear no resemblance to the social material of the lawyer. The study of biology, or nature in any of its manifestations, increases the power of observation of external objects, and if carried far enough, increases the power of generalization or induction. All this improves the mind, widens the mental vision and increases our capacity for enjoyment, but it has no direct bearing on the peculiar mental work which the law student and lawyer is called upon to do.

While I think many will agree that there is no direct analogy between the principal mental work of the lawyer and the mathematician, the physicist or the naturalist, I am prepared for some dissent when I make a similar assertion in relation to the work of the student of language or literature. It will be observed, however, that I have not stated that mathematics or physics should form no part of a lawyer's preparatory training. Neither do I say that the study of language or literature should form no part of this preparation. I am merely pointing out that, like mathematics and chemistry and biology, the mental work involved in the study of language or in the study of literature has no direct connection with the principal mental work of a lawyer or law student. In the first place, the materials on which the student of literature and the student of languages works are totally different in kind from that on which the lawyer works. Literary expression is the product of man's effort in a particular direction, just as his house and ships are the products of his efforts in other directions. Cases, the material of the lawyer, on the other hand, are the record of the actions of men in society and the consequence of those actions. One is the result of effort on the part of the individual, the other is the relation of individuals to each other. In the same way, in the study of languages, what has the proper translation of a sentence to do with what man will or ought to do in relation

to other men? It is true that a proper translation is often the result of a comparison of other and similar sentences, but in this work there is but a small element of the judgment of conflicting tendencies; and the material on which such judgment must be passed is so dissimilar from the material of the lawyer, that exercise in one class of judgments can be but little preparation for work in another. The study of language and literature has indeed a special claim on the would-be lawyer. But this is not because it has a direct bearing on the peculiar mental work of the lawyer; but because the material of the law is embalmed in written sentences, and work in languages and literature increases our ability to obtain the full meaning from a sentence. Again, such work increases our ability to express ourselves accurately, clearly and forcibly, and when the lawyer reaches a legal conclusion, or wishes to advance a legal argument, that is, after his real mental work on a legal problem is done, the ability mentioned is of great value to him. While it does not make him a great lawyer, it does aid him to make the most of his legal ability. In the sense explained, therefore, the study of language and literature has a place, and an important one, in the preparation of the lawyer for his life work; but it should always be borne in mind that these subjects have no more direct bearing on the training of those mental faculties necessary to the solution of the problems of the law than biology or chemistry.

This direct training is, I believe, alone found in the other social sciences. Law is one expression of our civilization. An accident of our educational system has served to make us separate law from economics, sociology and history. We all recognize physics and chemistry as forming a group of sciences which have to do with physical phenomena, the different branches of biology as having to do with plants and animals, sociology, economics and history as having to do with the social life of man. But the fact that the law had reached the dignity of a science long before the other social sciences; the fact that in England, until recently, Common Law was not systematically taught in the universities, but had to be picked up in the courts and inns of court, has led us to look at the law as something which has no relation

to any other science. The fact remains, however, that the material of the lawyer's study, while of course not identical with that which must be handled by the economist or the sociologist, or the historian, is like them in that it is the record of events of man in society, from which events rules determining future cases are evolved.

Not only is there a similarity in kind between the material of the social sciences, but there is also a similarity between the character of the necessary mental operations of the lawyer, and those of workers in the other social fields. In all the social sciences the so-called principles or laws, as we have pointed out is the case in law, are merely expressions of tendencies. The difficult work in each is to determine the principle which will prevail in a case which appears to be subject to two or more conflicting principles. In other words, in each of the other social sciences, as well as in the law, there must be the mental operation which we have called the judgment of tendencies. Take for instance a question in economics. What will happen if a particular tariff is placed on a certain commodity by Act of Congress? The answer involves a judgment of which among several results tending to be brought about by the Act will predominate. Economic opinions, as legal opinions, often practically amount to certain predictions, but the real work of the economist, as the real work of the lawyer, consists in estimating the probabilities of the relative strength of conflicting principles. What is true of the work of the economist and the sociologist is true also of the work of the historian, so far as that work is the judging of the causes of historical phenomena. Of course, when the historian is engaged in ascertaining whether a particular document is genuine, or the probability of the past occurrence of a particular event, he is doing mental work which bears no resemblance to the mental operations of a lawyer. He is passing judgment on material which is not the record of actions of men in society, but rather physical phenomena, the handwriting of the document, the spelling of the words, and the texture of the paper used.

Not only is the mental work of the lawyer and the worker in other fields of social science essentially the same, and the material used of the same general character, but since the

law is one expression of our civilization, in order that the student may obtain a grasp of its principles, and the nature and cause of its growth, he should have a mental concept of our civilization as a whole, the character of its development, its fundamental tendencies, and their ultimate causes. This can only be obtained by one who has more than a mere superficial knowledge of economics, sociology and history. The public policy which lies at the ultimate basis of our law is found in our social and economic conditions. History, political science, economics and law have therefore a closer relation to each other than physics and chemistry, than Latin and Greek, or than zoology and botany. In addition to the fact that the material is of the same character and the mental work of the student in each the same, the information acquired in the other social sciences not only throws a direct light on the problems met with in the law, but gives a mental picture of the movement of the social forces which would seem to be necessary before a student can adequately handle the more difficult problems of legal science.

If I have correctly pointed out the similarity between the mental work in the different social sciences and their dependence on one another, it would seem to follow that in preparing for the study of the law, while we should lay some emphasis on the study of language and literature, the principal emphasis should be placed on the social sciences. I do not wish to be misunderstood. I do not mean that mathematics, the physical sciences, or the training of the eye and hand should form no part of the liberal education of the lawyer, neither do I admire the German system which carries specialization so far that at the age of twelve a boy must choose his profession. On the contrary I believe that our primary educational system should contain something of each of the great branches of human knowledge, that every boy and girl should have sufficient of each, not only to enable them to obtain something of the peculiar mental training which each affords, but to enable them to ascertain the thing for which they are peculiarly adapted. And I am of the opinion that, except in rare instances, under our modern American primary system, it is impossible for the average boy to know what he is

adapted for unless he carries the different branches of knowledge at least as far as entrance into our more advanced colleges, and that, furthermore, in many cases it is impossible and therefore improper for a young boy or man to choose his life work intelligently until he has had at least two and in some cases four years of college work; but with all this we, as lawyers and teachers of law, have really nothing to do. When a man should choose a profession is an individual problem. On the other hand, how far different subjects should be compulsory on all students and when the power of the student to elect his own liberal course should begin; that is, whether it should be in the High School, the Freshman year at college, or the Sophomore or Junior year, are general educational problems with which we again, as persons interested in the training of men for a special work are not called upon to decide. Our province is, I believe, clearly defined. What do we want the man who comes to us to study law to know? Of course we want him to have carried each branch of education far enough to be sure that he chooses intelligently. But having chosen and having determined to be a lawyer, then I think that before he comes to the study of the law, those of us who are connected with law schools should insist that he has more than an ordinary knowledge of literature, and some knowledge of language; but above all that, without being an advanced specialist in any of the social sciences, he should have carried his studies in these subjects at least as far as the present undergraduate courses in our more advanced colleges.

It may be said that the stress which I have laid on the study of the social sciences as a preparation for legal work, while it may be proper, has no better basis of proof than the apparent analogy between the mental work of lawyer and laborers in other social fields. In other words, that there is no statistical proof. This is true. I am not aware of the existence of any statistics full enough to warrant a conclusion as to the relative value to the law student of different subjects of preparatory study. But is not the argument by analogy which I have used, in default of statistical proof to the contrary, sufficient to dictate a present policy for our professional schools?

What statistical information we have been able to gather at the University of Pennsylvania is at least suggestive. We find that the general average obtained in our examinations by our high school students is only from three to four per cent less than that obtained by our college graduates. If we confine our observations of college graduates to those who come from the larger universities, the per centum of difference is about five. The difference in the per centum receiving honors and the per centum of failures is slightly more favorable to the college men; that is, more college men receive honors and we have fewer failures among this class than among high school graduates, and the difference between the two classes in this respect is more marked than is the difference in the average grade of all college and all high school men. But in view of the fact that the average college diploma represents at least three years more of preparatory study than the average high school diploma, there should be a greater difference between the two classes. On the other hand, with rare exceptions, the leaders of our classes are college graduates who have, during their college courses, laid special emphasis on the social sciences or on languages. On the other hand, among our high school graduates we find that men with what is called an industrial training are very apt to fail. In other words, while the statistics we have gathered are wholly insufficient to base any positive conclusion on, yet so far as they go they indicate that from the standpoint of the student of law, the character of his preparatory study is important, and that a course in college which lays emphasis on the social sciences or languages, or both, is productive of the best results.

If the conclusion at which I have arrived is correct, it will be natural for those of us who are connected with law schools having admission requirements equivalent to college admission requirements, to ask ourselves whether it is possible for us, in addition to our present requirements, to insist that our students come to us with additional knowledge of literature and language, and a special knowledge of history, sociology and economics. The answer to this question will depend somewhat on the number of years which a student must add to his high school work. How many years additional study

beyond the ordinary high school graduation is then necessary to produce the kind of liberally educated man that we need? Are four years necessary? I do not think so. While I have deprecated the effort to begin specialization at an early period, I believe it to be true that if one knows what his life work is to be, he can obtain a liberal education adapted to the technical education which must follow his liberal studies in a shorter time than if, while obtaining the last part of his liberal training, he has no conception of what he is going to do, and therefore probably lays emphasis on studies which, while liberalizing and useful, are not more so than others which would bear more directly on his work in life. While perhaps the majority of the sons of wealthy parents do not choose a business or profession until near the end of their college course, the average boy who graduates from our High Schools knows at his graduation whether he intends to study law or not, and for this class, which is the class that as a whole now passes directly from the High School to the Law School, it would be possible to reduce the length of time which they should spend in college, because from the start they would know the kind of a liberal education they desired.

Admitting that it will not be necessary for the average high school graduate to spend four years in college to obtain the liberal education indicated, it is nevertheless true that he will have to spend at least two years, or probably three, before beginning his legal studies, and the practical question is: Can the law student of the near future be made to do this, not those who come to a few great universities, but generally? I think so. My experience leads me to believe that the real difficulty in persuading the average high school graduate of nineteen to take a course in college before taking up the study of law is not so much the expenditure of time and money involved, but the difficulty of persuading him or his parents that such a step is essential. So long as they think that a college course has no direct connection with legal work, while they may admit the theoretic desirability of a college training, it is indeed difficult and often impossible to induce the boy or his parents to undergo the necessary sacrifices to obtain it. On the other hand, I have found that if you can

get into the minds of the boys and their parents the fact that what you want is not so much this indefinite thing known as a college course, but a knowledge of history, of economics and sociology, because of the relation of these things to law, it is not so difficult to persuade the would-be law student to go first to college for at least a partial course..

My point is that it is possible for all good law schools to pass beyond their present requirements for admission, even where these requirements are now equivalent to a college entrance examination; but that this result can only be brought about by law school faculties having a definite idea of what they want their students to know. Law schools generally cannot hope to be able to insist upon their students first going to college unless they have a definite idea of the principal subjects which the student should study at college, and be able to show some definite relation between the college work and the law school work. They cannot insist on a college course as an indefinite thing, but they can insist on their students being prepared in particular topics; and I believe that this insistence will result in a short time not only in the requirement of a college diploma, though the diploma may be gained in less than four years, but in a diploma obtained as the result of a college course which, while liberal in the best sense, has laid special emphasis on particular subjects. I am optimistic enough to believe that we shall soon see a larger number of our schools of law in all parts of the country rapidly moving towards the point where they will demand of those who would enter, a liberal education better than that now acquired by the average graduates of our best colleges, and that this result will be obtained by insisting on a liberal education which bears a definite relation to the work which the student of law and the lawyer is called upon to do.

William Draper Lewis.

THE COEFFICIENTS OF IMPUNITY.

(Being an Inquiry into the Social Defence against Crime.)

In these days of penal and criminal reforms it may well be asked, "Are we sufficiently protecting the law-abiding majority against the attacks of the enemies of law and order, which constitute a minority?" "Does our criminal and penal legislation and the machinery of the law as at present operated constitute an adequate social defence against crime?"

The first step towards the ascertainment of a correct answer must necessarily be a comparison between the means of offence within the reach of the criminal with the means of defence used by the state.

It should be understood that in fighting criminals, especially thieves, forgers, embezzlers, as well as the so-called born criminals, we encounter no commonplace intelligence, but, as Major Griffiths has amply shown in his recent book ("Mysteries of Police and Crime"), a lively and cunning energy.

It will be my endeavor to show that the most dangerous and efficient weapon of offence in the hands of malefactors is what might be called the tenderness of our laws and customs towards persons accused of crime. It is not my purpose to examine the subtle distinctions which our courts have ingeniously made in the definition and application of the ancient doctrine of "reasonable doubt." I examine it from the standpoint of the offender, and to him it means nothing more or less than his chances of escape. These have been rightly called "the coefficients of impunity" and it is these that we must carefully study.

These coefficients may be divided into two classes, viz: those which may be called *legal*, because sanctioned by law or not forbidden by it, and *social*, because arising from causes which are extra-judicial or extra-statutory.

Looking first at the *legal* coefficients of impunity let us

see how many chances of escape a criminal possesses as against the chances of conviction. He may

1. Escape arrest by escaping detection (so-called mysterious crimes).

2. He may be suspected but never arrested, if the suspicions are not technically sufficient to justify an arrest.

3. If he is arrested he has two chances of escaping indictment, first by being discharged by the committing magistrate and second by a failure of the Grand Jury to indict him.

4. If he is indicted he has the following chances of never being tried: first, he may be bailed and may jump his bail; second, the indictment may be pigeon-holed; third, the indictment may be quashed; fourth, the witnesses for the prosecution may die or disappear; fifth, he may be discharged on the recommendation of the prosecuting officer.

5. If he is brought to trial, his chances of escape may, in a rough way, be summed up as follows: first, acquittal for lack of proof of guilt beyond a reasonable doubt; second, acquittal on a technical defence such as the statute of limitations; third, a disagreement of the jury, which generally means discharge of the accused.

6. If he is convicted, his chances of escape are: first, reversal on appeal; second, executive clemency.

Let us now examine these coefficients in some detail. Unfortunately statistics on matters criminal are not very complete and satisfactory. Statistical data are especially lacking as regards the question of "mysterious crimes" in which the offender has never been discovered. The police are naturally averse to making such records public for they essentially amount to a statement of the inefficiency of the Detective Bureau.

I have kept a record of murders in New York City from 1895 to 1898 in which the murderer escaped detection. There were at least thirty-five such, of which some twenty were of such a sensational and shocking nature that they elicited not only the special attention of the police and detective forces of the largest city in our country, but also called into play the aid of an enterprising press. Yet the murderers of all these victims are still at large.

Before this appalling list of unpunished murderers, minor crimes seem unimportant. Yet I am informed that within a period of three years and during an honest police administration, there were over fifteen hundred burglaries, robberies and minor crimes committed in New York City, of which the perpetrators were never discovered.

J. Holt Schooling in a series of interesting statistics arrives at the conclusion that only fifty out of every one hundred crimes reported to the police are traced to their perpetrators, although prosecutions are held in seventy-five cases out of every one hundred crimes. That is to say, 25 per cent of crimes are perpetrated so successfully that even a *prima facie* case cannot be established, while 50 per cent of all crimes go unpunished. And this in a country like England, which is justly proud of its police system. Other statistics show an even greater percentage of impunity. Thus the proportion between crimes and arrests in England is stated to have varied from 44 to 45 per cent in 1886-87 and to have risen to 46.8 per cent in 1892-93. Turning to other countries we find that since 1825 it has been estimated that in France there have been 80,000 crimes committed where the offenders were never discovered. In Italy, according to the statistics of 1895, there were 102,004 trials against known parties as against 36,751 unknown parties. The official statistics of that kingdom show that 44,113 crimes went unpunished in 1885, 64,385 in 1890 and 63,147 in 1892. The poverty of statistical data based on scientific principles in our country makes it impossible to give the percentage of impunity in the United States, but the figures furnished by the county of New York, cited above, show that we have nothing to boast of in our success in detecting crimes and bringing their perpetrators to justice.

We can hastily pass over the second point which cannot be made a subject of statistical study. I refer to those criminals against whom suspicion exists, but of such a slim nature that under our laws no arrest can be made,—cases where there is a moral certainty, which could be very easily converted into a legal certainty by the prompt apprehension and close surveillance of the suspected. So that it may be said that a criminal may not even completely hide

his tracks; it is sufficient if he covers the most damning ones!

A passing consideration of the third legal coefficient of impunity will suffice. It often happens that the police are certain that a suspected person is the guilty one, but they do not possess sufficient evidence, or oftener, do not have the skill to make out a technically perfect *prima facie* case. The committing magistrate looking upon the evidence in a *legal* light finds it insufficient to hold the prisoner and gives him the benefit of the doubt. The police may afterwards be able to perfect their case, but it is then, often, too late. Or again, the Grand Jury, in the pressure of other cases, may fail to indict the accused, who thereupon on the application of his lawyer, who pleads the "undeniable right" of a man not to be unduly restrained of his liberty, is set free.

Of 1,475 arrests for felonies in New York County during three months, 615 were released during the said period. Of these five died before trial, 117 were acquitted and 493, or over 62 per cent, were discharged without trial. This may give an idea of how many escape at the preliminary skirmish with the forces of law.

How many who are indicted are ever brought to trial? No one knows, not even the District Attorney. The invention of the pigeon-hole has been the greatest boon to the criminal who is fortunate enough (and many of them are) to have either a "pull" or to be able to procure bail, or has sense enough to avoid the commission of any crime of a sensational or interesting character, such as will enlist the professional sympathy of the prosecuting officer. And how many more escape trial by having their indictments quashed on a technicality, which the District Attorney seldom corrects, or by delaying the day of reckoning until the death of important witnesses, fills the prosecuting officer with a feeling of "convenient mercy" which induces him to recommend to the court the discharge of the prisoner!

The sifting process goes on and guilty men disentangle themselves from the thin, loose meshes of the law until only a very few are left for trial. Then the process begins again; but with a new advantage to the accused, for, at the trial, he has the services of learned lawyers, well up in all pro-

fessional tricks, distinctions and oratorical inducements. The legal battle may suddenly end in an acquittal on proof that the crime is barred by time. If no such plea is raised what a titanic labor is before the prosecuting officer in order to obtain a conviction! He must convince twelve men *beyond a reasonable doubt* that a crime has been committed by the accused whom they are solemnly instructed to consider innocent until conviction; he must prove to them *beyond a reasonable doubt* that the accused is perfectly sane and was sane when he committed the act; he must establish by legal evidence the act and the motive which prompted it and prove his guilt by the production of facts, which, by the very nature of the act charged, are well-nigh impossible of production; he must offset the evidence of the defence, destroy its force and overcome the natural tendency of jurors to acquit. He must do all this in conformity with countless ambiguous rules of procedure and principles of evidence, because one single slip may suffice to give grounds for reversal on appeal. If he succeeds in convincing only eleven of these twelve good men and true, if he cannot free the conscience of the twelfth man of a "*reasonable doubt*," his work has been all in vain, except in showing his hand to the defence. Or if he falls into any pitfall prepared by the shrewdness of the defence, his work, though otherwise perfect, will likewise have been in vain. Disagreement of the jury or reversal on appeal means, in most cases, acquittal.

With consistent tenderness towards the accused, our laws provide that no man's life shall be twice put in jeopardy for the same offence. The absence of the right of appeal on the part of the state in criminal cases which is restricted on the part of the defendant results as was recently pointed out in the *American Law Review*, in such delay and technical obstruction "that an outraged people have become thoroughly tired of it." And it cannot be denied that the existence of this ancient principle of not jeopardizing a man's life twice for the same crime often means that, if a criminal is acquitted by reason of a hastily prepared case or on a technicality, the most damning proof that may thereafter be found against him will be useless and unavailable. So that the social defence is so conducted under our laws that we may

not only have an *unknown* criminal at our side which the state has been unable to detect, but we may also have to tolerate a *known* one whom the law has bound itself to keep out of prison.

Let us now consider the last legal coefficient of impunity. Of the small proportion that are convicted, what part pay the full penalties for their misdeeds? The abuse of the pardoning power is an old subject and a few statistics on that point will suffice. The official records of New York State show that between 1846 and 1896 there were granted 80 full pardons from life sentences, 4,453 full pardons from lesser sentences, besides 226 conditional pardons. Add to these 111 commutations from capital punishment to life imprisonment and 1,758 commutations from lesser sentences and we have a total of 6,448 interferences with the decrees of the courts in half a century! It has been estimated (though I cannot vouch for its correctness) that the percentage of criminals released by executive clemency is 50 in Massachusetts and 33 in Wisconsin; and that the average time served by pardoned life prisoners is $6\frac{1}{2}$ years in Massachusetts and $6\frac{1}{2}$ years in New York.

Thus, from first to last, the social defence as provided by our laws, by favoring the offender and giving him numberless chances of escape, ignores the principle that the law's first object is the protection of the honest citizen.

But there are other coefficients of impunity besides these legalized methods, which may be called the official protection; and which, as I have tried to show, protect the offender and not the offended. I refer to an *imperfect or mistaken public morality*. This *social complicity* in crime, as it has been aptly called, is observable under many forms. There is, first, a popular tolerance, mistakenly called pity, for certain criminal acts, notably crimes of passion or so-called crimes of honor. Duelling is, fortunately, on the decline in our country, but emotional and hysterical acquittals of persons guilty of taking the law into their own hands to avenge their honor are by no means uncommon. The evils of such acquittals, which amount to a glorification of crime, are too obvious to require explanation.

The social complicity as a coefficient of impunity is es-

pecially harmful in those very numerous instances in which honest men and women become accomplices in crime, either by timidity or by the desire of avoiding trouble. How many crimes, such as petty thefts, go unpunished because the victim shrinks from entering a police court and going through the trouble of a trial? How many offences which we think we condone out of pity, or magnanimity, are really excused for the sake of saving ourselves time and trouble? We stifle the voice of our consciences by saying it is a small matter, or that it will never be repeated or that every one should have a chance. Yet the most experienced penologists, the best scholars of criminal science, tell us that such forgiveness aids, instead of checking criminality, that it induces the offender to repeat the act, having learned that it may go unpunished. And, while it is true that offences of this kind are generally petty and insignificant, yet in criminal life, as in the moral life, nothing is so important as to "beware of small beginnings."

There is also a marked social complicity among the better classes resulting from that *esprit de corps* engendered by societies and clubs. How many minor offences committed in a college, a club, or a private community of men, are never reported to the police, because it might injure the good name of the institution?

And let us not forget that there is also a professional and commercial complicity such as that of lawyers who stoop to the fabrication of testimony, of doctors who aid in the avoidance of natural duties and responsibilities; of business men who by "deceit and adulterations which furnish the illusion of cheapness" set the example for criminal imitation among the masses. As one of our best students of penal problems has justly observed, "many of the maxims and practices of the business world are essentially dishonest and they are glibly cited by convicted criminals in justification of their own misconduct."

These are a few examples of social complicity with crime, a few of the coefficients of its impunity, out of the mass of passive or active potentialities that are arrayed against the insufficient defences of the state. If the consequences of such a state of affairs, of such weakness of the social de-

fence, are not as serious as one would imagine, it is because the criminal class is not a large one. According to the census of 1890 the number of criminals in our prisons was 82,329, a very small percentage of the population of 50,000,000. By the same census there were 14,846 juvenile delinquents in asylums and 14,371,893 children in our public schools. Even adding undetected criminals and what might be called latent-criminals, the total of the criminal population would not probably reach a very large percentage of our entire population. But its small size cannot be an excuse for our inefficient social defence against it; by reason of its contagious properties and, unfortunately, of our lack of moral strength, crime stands as a perpetual menace to our welfare and, though we cannot blot it out of existence, we must at any rate spare no effort to minimize its power for evil.

It would be beyond the limits of this article to examine the various methods of strengthening the social defence which have been suggested by sociologists and students of crime. But from the facts above set forth it may be stated, in a general way, that the social defence against crime, to be successful and effective, must be two-fold; it must consist first of a standing army composed of well-trained and experienced men assigned to various special duties. These are the judges of our courts, the prosecuting officers who represent the people, the police who do picket duty against crime, the detective force which spies on the enemy, the experts who help to unravel difficult questions and the various officers, such as sheriffs, prison-wardens and keepers who execute the mandates of the courts. But this standing army must be supported in the battle for the social defence by a *national guard* or *militia* recruited from all ranks of honest citizens who desire the continuance of the supremacy of the law.

The co-operation of these two armies will not eradicate crime, but it will minimize its power for evil; it will diminish the chances of impunity and thereby deplenish the ranks of malefactors.

And let us remember that the battles fought by these two armies against the enemies of law and order will fur-

nish as excellent opportunities for the display of heroic civic virtues as are afforded by the most imposing of military operations. There is nothing so illogical as to imagine that our duty to the state is limited to our defending it against the armed aggressions of a foreign foe. There are more insidious enemies which attack it from within ; to fight these is one of the great duties of citizenship.

Gino C. Speranza.

New York.

DOES THE RELATION OF LANDLORD AND TENANT BECOME SEVERED BY OPERATION OF THE BANKRUPT LAW?

Referee Hotchkiss, of Buffalo (*In re Collignon*, 4 Am. B. R. 250), 1900, in speaking of unaccrued rent, says: "The law has been fairly well settled, and seems to be that, at the time of the bankruptcy, installments of rent accruing thereafter are neither provable debts against the bankrupt's estate, nor affected by his discharge." Citing *In re Jefferson* (2 Am. B. R. 206), 93 Fed. 948 (1899); *In re Goldstein* (2 Am. B. R. 603), 1 N. B. N. 422 (1899); *In re Shilliday*, 1 N. B. N. 475 (1899); *In re Mahler*, 2 N. B. N. Rep. 70 (1899).

As to the proposition that installments of rent, accruing after an adjudication of bankruptcy, are incapable of being proven, there is no doubt whatever that such is the accepted rule. But there is a difference of opinion amongst judges and referees as to such rent *not being affected by a discharge*. In other words, it has been decided in some tribunals that, "the relations of landlord and tenant are severed by operation of the bankrupt law;" while in other jurisdictions it is as emphatically laid down that the relation is "not determined by the bankruptcy of the lessee."

Since the passage of the Bankruptcy Act of 1898 the judicial utterances on the subject of the effect of bankruptcy on unaccrued rent have been three in number, viz.: those of Judge Evans, of the District Court of Kentucky, *In re Jefferson*, 93 Fed. 848, 2 Am. B. R. 206 (1899); Judge Lowell, of the District Court of Massachusetts, *In re Ells*, 3 Am. B. R. 564 (1900); and Judge Purnel, of the District Court of North Carolina, in *Bray v. Cobb*, 3 Am. B. R. 788 (1900). In addition to the opinions of the aforesaid U. S. Circuit Court Judges, there are quite a number of reported opinions of referees, representing jurisdictions in various parts of the country.

Judge Evans, in the course of his opinion *In re Jefferson* (*supra*) says: "The court sees no way to avoid the conclu-

sion that the relation of landlord and tenant in all such cases ceases, and must of necessity cease when the adjudication is made. If the relation does cease, the landlord afterwards has no tenant and the tenant has no landlord. At the time of the adjudication the bankrupt is clearly absolved from all contractual relations with, and from all personal obligations to, the landlord growing out of the lease, subject to the remote possibility that his discharge may be refused,—a chance not worth considering. After the adjudication there is no obligation on the part of the tenant growing out of the lease. He not only owes no subsequent duty, but any attempt on his part to exercise any of the rights of a tenant would make him a trespasser. His relations to the premises and to the contract are henceforth the same as those of a stranger. He can neither use nor occupy the property. No obligation on his part to pay rent can arise when he can neither use nor occupy the property. The one follows the other, and it seems clear that no provable debt, and indeed no debt of any sort against the bankrupt, can arise for future rent. No rent can accrue after the adjudication in such a way as to make it the debt of the bankrupt."

In line with this opinion is *Bray v. Cobb* (*supra*), in which Judge Purnel says, *inter alia*: "An adjudication in bankruptcy terminates all contractual relations of the bankrupt. The object of the proceeding is to administer completely the bankrupt's estate, to collect his assets, apply them to the payment of his debts then owing and discharge him from further liability. As to the rent . . . , the contractual relations being terminated, a landlord is not entitled to prove a claim for rent against a bankrupt after such bankruptcy ceases to use the building. The relations of landlord and tenant are severed by operation of the bankrupt law."

On the other hand we have the opinion of Judge Lowell, of Massachusetts, *In re Ells* (*supra*), in the course of which he states that: "The law concerning the effect of bankruptcy upon a leasehold is stated in *ex parte Houghton*, 1 Low. 554, Fed. Cas. No. 6725 (1871): 'The earlier law of England, which we have adopted in this country, was that the assignees of a bankrupt have reasonable time to elect whether they will assume a lease which they find in possession, and if

they do not take it, the bankrupt retains the term on precisely the same footing as before, with the right to occupy and the obligation to pay rent. If they do take it, he is released, as in all other cases of valid assignment, from all liability, excepting on his covenants; and from these he is not discharged in any event.' ” (See also Hall, “Landlord and T.,” 346.)

“I can find nothing in the act of 1898 to produce a result different from that of the act of 1867. Had there been no clause giving the lessor the right to re-enter, the trustee in bankruptcy would have had a reasonable time to elect whether to assume or to refuse the lease. If he had assumed it, the bankruptcy would have operated like any other assignment, and would have released the bankrupt from all liability, except upon those of his covenants not already broken which would have remained binding upon him after any assignment. If the trustee had refused to take the lease, the bankrupt would have remained as before.”

Judge Lowell then considers the opinion of Judge Evans *In re Jefferson* (*supra*), and comments thereon as follows: “With all respect for the learned judge, I must think the above remarks made somewhat hastily, unless they are to be taken as limited to the particular lease in question, or made to depend upon some peculiar statutes of Kentucky. . . . It follows, then, that the lease here in question was not determined by the bankruptcy of the lessee, but only by the re-entry of the lessor. *Savory v. Stocking*, 4 Cush. 607 (1849); *Treadwell v. Marden*, 123, Mass. 390 (1877).”

The opinions of referees, on the question under discussion, are numerous and various. The majority of them seem to incline to the idea that the relations of landlord and tenant are not severed by bankruptcy of the tenant, although others view the question from the opposite standpoint.

It is, perhaps, interesting to notice that Vol. IV, No. 2, of the advance sheets of Am. B. R. has the two views expressed within the space of nine pages. On page 246 (*In re Arnstein et al.*) (1900), Referee Pendleton, of the Southern District of New York, holds that a lease is terminated and the right to collect unaccrued rent gone where the landlord, after the bankruptcy of the lessee, rents the property to the

trustee and receives compensation therefor, and the property is thereafter surrendered by the trustee to the landlord. In the case next reported in the same pamphlet, viz., *In re Collignon*, page 259 (1900), Referee Hotchkiss, of the Northern District of New York, opines that, rent to accrue on a lease not expired at the time of the bankruptcy is not affected by the bankrupt's discharge.

Perhaps the opinion which evidences the most careful preparation and which thoroughly discusses the question is that of Referee Harlow P. Davock, of the Eastern District of Michigan, *In re Mahler*, 2 N. B. N. Rep. 70. In that case the referee holds that a lessor's rights against the bankrupt are unaffected by the discharge in bankruptcy, but he can collect payment from after-acquired property only. He reasons that rent afterwards to accrue, not being a personal debt, is not provable and, unless the creditor, at the time allowed for proving claims, be able to produce and verify such debt, he will not be entitled to receive from the bankrupt's estate his dividend; *ergo*, he should not be barred from his future action against the bankrupt.

Referee Davock's opinion bristles with authorities, both English and American. He cites cases construing the former bankruptcy acts, and all of the cases referred to by him seem to sustain his view of the case; although, had he been so inclined, he, doubtless, might have found some cases in support of the opposite view of the question, even under the former bankruptcy acts. For example, there is *In re Breck*, 12 N. B. R. 215, 8 Ben, 93; Fed. Cas. 1822 (1875). In that case (which was under the Bankruptcy Act of 1867) Judge Blatchford, of the U. S. District Court for the Southern District of New York, said that a lease, which cannot be assigned without the consent of the landlord, is canceled by the bankruptcy of the tenant.

Referee Davock's opinion, weighted with "numberless precedents," is in strange contrast to Judge Evans' decision *In re Jefferson* (*supra*), which is a bare but logical and fair-minded exposition of the law, based upon the broad ground of public policy.

While it is true that no prior decision should be reversed without good and sufficient cause, yet the rule of *stare de-*

cisis is not in any sense ironclad, and the future and permanent good to the public is to be considered rather than any particular case or line of cases. Precedent should not have an overwhelming or despotic influence in shaping legal decisions. The benefit to the public in the future is of greater moment than any incorrect decision in the past.

Of the four bankruptcy acts passed by Congress, the Act of 1867 is the only one which, in specific and direct terms, refers to the subject of rent. Section 19 of that act provides that where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove, for a proportionate part thereof, as if the same accrued from day to day, and not at such fixed and stated periods. This act, like all the other bankruptcy acts, is, however, silent on the question of a bankrupt's liability for future accruing rent.

What is the object of the bankruptcy law? Is it not twofold, viz., (1) the distribution of the property of an insolvent debtor amongst his creditors and (2) the discharge of the debtor from his liabilities? *In re Klein*, 1 How. (U. S.) 227; *In re Silverman*, 4 B. R. 523; *In re Reiman et al.*, 11 B. R. 21.

That being the case, and the fact that legislation and judicial decision should, as far as practicable, be based upon the broad ground of public policy, does it not seem proper that a discharge in bankruptcy should sever the relations of landlord and tenant? Alexander the Great, at Gordium, unable to find the ends of the knot which fastened the famous chariot, cut the cords asunder with his sword, and, tradition doth say, was thus enabled to conquer the world. Judge Evans, with the apodictical sword of common sense, has cut the cords of "dialectical subtleties" which would not release the bankrupt from the very obligations that he sought the law to relieve him of.

John M. Patterson.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

BILLS AND NOTES.

Balcom v. O'Brien, 83 Northwestern, 562 (South Dakota), discloses some pretty serious bungling on the part of the attorney for the defendant. The suit was on a note, and the indorsement was in the name of the payee, "per George N. Farwell, his Attorney in Fact." This was offered in evidence by the plaintiff and was admitted, defendant's attorney making no objection. Later he asked that a verdict for defendant be directed, because the plaintiff had not proved George N. Farwell, the attorney in fact of the payee. But the court held the objection made too late; that when the note was offered was the time when the plaintiff should have been called on to prove Farwell's attorneyship, and allowing the note to be admitted without objection precludes him from raising this question later.

The principle that a writing on the back of a note, "We hereby guarantee the payment of the within note," does not constitute an indorsement, but under the Massachusetts rule a non-negotiable chose in action, is reiterated in the case of *Edgerly v. Lanson*, 57 Northeastern, 1020. The court also in the same case applies the well-established rule that a transfer of a note after maturity, though without consideration, for the purpose of having the transferee bring an action thereon, entitles him to maintain such action in the right of the transferor.

CONSTITUTIONAL LAW.

The efforts on the part of various States to control the rates charged by railroads have been fruitful of litigation, and cases seem always to leave some undecided point. In *Louisville & N. R. Co. v. McChord*, 103 Federal, 216, a statute of Kentucky passed so late as March 10, 1900, after many of the important decisions in reference to those State enactments, is held a violation of the Fourteenth Amendment and unconstitutional on several grounds: first, because it allowed a commission to fix the

CONSTITUTIONAL LAW (Continued).

rates of one particular railroad without the necessity of such rate being general, thus denying to such company the equal protection of the laws; and second, because it made the basis of the regulation of rate the fact that such railroad had charged extortionate rates, and left the decision of this latter question to the commission, a non-judicial body, free to determine in its own discretion what should constitute extortion. This commission was authorized to act merely upon notice sent to an employe of the company, and if it found that the rates hitherto charged were extortionate there was no appeal from its finding. The law in such case allowed it to fix rates at what it regarded as just and reasonable. The Circuit Court of the United States (D. Kentucky) held that this combination of provisions clearly provided for a taking of property without due process of law and could not be upheld.

The act was further held invalid because the charter of the railroad company in this case fixed the maximum rates it might charge, and the court held that this act, without attempting to repeal such charter, empowered the railroad commission to subject the company to criminal prosecution and heavy punishment for charging the rates therein authorized.

The well-known original package rule finds a late application in *May & Co. v. City of New Orleans*, 20 Supreme Court Reporter, 976. The case turns on what is an original package, and in this case the tax imposed by the city of New Orleans is held not to be violative of the Federal Constitution, because while the goods were retained in certain packages in which they were received, yet the "boxes, cases or bales in which the goods were shipped were the original packages." When these were opened the package was broken and its contents became mingled with the general mass of property in the state, notwithstanding that inside these "boxes, cases or bales" the goods were packed in smaller packages, which latter packages remained unopened when the tax was imposed.

The constitutional provision securing to the accused the right to be confronted with the witnesses against him has frequently been argued to affect the right of the United States to use depositions of absent witnesses. In *Motes v. United States*, 20 Supreme Court Reporter, 993, this provision was held to prevent, on the final trial of the defendant, the use of the deposition or statement of an absent witness taken at an

**Depositions,
Right to be
Confronted
with
Witnesses**

CONSTITUTIONAL LAW (Continued).

examining trial, where it did not appear that the witness was absent by the suggestion, connivance or procurement of the accused, but where it did appear that his absence was due to the negligence of the prosecution. There had been an opportunity for the defendant to cross-examine, but this was regarded as insufficient, when it clearly appeared that failure to produce the witness himself resulted from unexplained negligence on the part of the officers of the government.

Following *Village of Norwood v. Baker*, 172 U. S. 269, the U. S. Circuit Court (E. D. Michigan) holds in *Parker v. City of Detroit*, 103 Fed. 357, that the provisions in **Street Improvement Assessment** a city charter requiring the common council to assess the entire cost of paving upon the property abutting on the street pro rata according to the foot front of such property, without any reference to the question of benefits, the only notice required to lot owner being by publication in the city newspaper, and no tribunal having any authority to reduce the assessments or review the amount thereof—that all these provisions together constitute a mode of taking property which is not that due process of law required by the Fourteenth Amendment to the Constitution. No provision being made for an inquiry into the benefit accruing to the various properties from the assessment, it was *prima facie* manifest that such a method would not secure a just result.

The provision in the Fifth Amendment of the National Constitution, that a man shall not be compelled in any criminal case to be a witness against himself, decides the **Privilege of Witness** case of *In re Feldstein*, 103 Federal, 269. The answers in that case would have disclosed that certain checks were given for gambling debts, the receipt of which under laws of New York, where the U. S. District Court was trying the case, is a criminal offence. It was sought to avoid this provision of the Constitution by claiming that Section 7a (9), in enacting that as respects the bankrupt—and this was a bankruptcy case—"no testimony given by him shall be offered in evidence against him in any criminal proceeding," protected also the witness in bankruptcy proceedings and deprived him of the constitutional privilege. But the court held that, even if the action in question should be so construed, this would not follow, because to enable the court to compel the witness to testify the law must be such that it for-

CONSTITUTIONAL LAW (Continued).

ever bars him from prosecution for the offence which his testimony discloses; otherwise, the constitutional privilege operates.

All will admit that a court may not arbitrarily insert an intent into a statute, where no intent is expressed upon the face, but where this rule is applied—as it is by the dissenting justices of the Supreme Court of California in *Ex parte Lorenzen*, 61 Pac. 68—to nullify the plain intent of the statute and, in addition, to render the latter unconstitutional, a halt should be called. A San Francisco ordinance rendered it a misdemeanor for any person but an authorized street car conductor to “deliver, sell or give” to another any transfer of a street railway company. The majority of the court held that this was a valid exercise of the police power, as it certainly was; but the minority declared that it was unreasonable and in violation of the Fourteenth Amendment, because the ordinance did not declare in express terms that it was aimed only at fraudulent or illegal selling or delivery, and therefore, “if the conductor should give to a father traveling with his family three or four transfers, and he in turn should hand them over to his wife and children, he would at once become amenable to the ordinance!”

State v. Santee, 82 N. W. 445, gives a blow to an important monopoly in the State of Iowa. A statute was passed prohibiting the sale of petroleum for illuminating purposes emitting a combustible vapor at less than a certain temperature, “except the lighter products of petroleum when used in the Welsbach hydrocarbon incandescent lamp.” It being shown that there were other lamps constructed substantially upon the same principle as the Welsbach lamp, the Supreme Court of Iowa properly declared the statute void, as an attempt to deprive the other lamp manufacturers of equal protection of the laws, as required by the Fourteenth Amendment.

Municipal ordinances regulating the retailing of liquors and the opening and closing of saloons have generally been sustained. However, such ordinances may go too far. In *Mayor, etc. v. McCann*, 58 S. W. 114, the ordinance prohibited any owner of a saloon from entering his saloon on Sunday for any purpose, without special permission from the mayor of the town. The Supreme Court of Tennessee held the ordinance arbitrarily oppressive and void under the Fourteenth Amendment.

Law Prohib-
iting Sale
of Gift of
Transfer
Tickets

Privilege
to One of a
Class

Municipal
Ordinance,
Reasonableness

COURTS.

Gableman v. Peoria, etc., Rwy. Co., 101 Fed. 1, is an important case, passing, as it does, upon a question which must ultimately be decided by the Supreme Court of the United States. The Circuit Court of Appeals for the Seventh Circuit were called upon to decide whether or not an action against a receiver of a railroad for negligence in the operation of the road is removable into the Federal court solely on the ground that the receiver has been appointed by a Federal court. Judge Grosscup, in a well-reasoned opinion, decides that the action is not so removable, since it does not bring into question any matter connected with a law of the United States, or the decree appointing the receiver. The remarks of Fuller, C. J., in *Pope v. Rwy. Co.* 173 U. S. 573, are taken to be an "*ex cathedra* announcement" of the doctrine, but it is not always safe to put too much reliance upon such *dicta*.

CRIMINAL LAW.

The case of *Motes v. United States*, above referred to, settles the rule that though under ordinary circumstances appeals from judgments of the U. S. District Court in criminal cases, where the offence is not capital, are only to the Circuit Court of Appeals, yet where the case involves a consideration of a right claimed under the Federal Constitution an appeal may be taken directly to the Supreme Court.

DAMAGES.

The difficulty of attempting to try two issues in one, which has had so much influence in the development of the doctrine of set-off, appears to be the determining element at the basis of the New Jersey decision of *Wyckoff v. Bodine*, 47 Atlantic, 23. In that case A., the owner of woodland, sold timber to B. B. cut, but failed to remove in agreed-upon time. A. converted part of the lumber. B. sues A. for this conversion and it is held that the measure of damages is the value of timber taken at the time A. converted it; and that A. may not claim in reduction of this that he has been injured by B.'s having left the timber on his property without legal right. This gives him a cause of action against B., but he must enforce it in another suit.

DEATH AS A CAUSE OF ACTION.

Whether or not a settlement between an injured person and the party by whom he is injured deprives the persons, who would have a cause of action by statute in the event of his death, of their remedy is the question presented in *Southern Bell Telephone & Telegraph Co. v. Cassin*, 36 Southeastern, 881. Under the English decisions, construing Lord Campbell's Act, such settlement is held a bar to further proceedings, whether by the personal representatives of the decedent or the statutory beneficiaries. This is a result largely of the language of the act which gives this new remedy in such cases, as the deceased had a cause of action at the time of his death. If he has settled, of course he had no cause of action at the time of his death, and in such case the act does not confer any, but leaves matters as at common law.

The language of the Georgia Code is not conclusive as it is in Lord Campbell's Act, but gives a right of action where death is caused by negligence to certain relatives of the deceased; yet the Supreme Court follows the doctrine of the English courts and holds the settlement by the injured party before his death a bar to any recovery under the statute thereafter. The court enters into a careful review of the cases on this subject in the various courts of the country, and reaches its conclusions on general principles extra the language of the statute. The decision of the court is opposed by a vigorous dissent on the part of Justice Colb, which is concurred in by another justice of the court.

 GUARDIAN AND WARD.

The Supreme Court of California holds in *Wright v. Perry*, 62 Pacific, 176, that an indebtedness incurred by a guardian of the estate of a minor is not a good consideration for a note by the successor of such guardian. An effort was made to hold the ward on the ground of a ratification, in that she had knowingly received the benefits derived from the expenditure of such money, but the court held that as none of these benefits accrued after her coming of age she could not be held even though she had not expressly disavowed liability on attaining her majority.

 HUSBAND AND WIFE.

Incidentally illustrating the modern tendency of the law to depart from the original theory of the legal unity of husband

HUSBAND AND WIFE (Continued).

Domicile of Child in Custody of Divorced Wife. and wife; the case of *Hicks v. Fox*, 83 Northwestern, 538 (Minnesota), refuses to follow the strict common law rule that until majority the domicile of a child is always that of its father, but holds that where the wife has been divorced and the custody of the child awarded to her unrestrictedly, the domicile of the child is that of the mother. The common law theory, the court says, merged the legal entity of the wife in that of her paramount lord, and until recent enabling statutes she had no separate legal existence; from which "it followed as a logical necessity that the residence of the wife and mother, even in cases of separation, did not control and fix the domicile of the marriage offspring."

Yet notwithstanding the many innovations of the past century, common law rules are continually reappearing in the decisions, for in the Supreme Court of Massachusetts the old rule that a wife could not contract with her husband was recently re-enforced under the following circumstances: The plaintiff had loaned money to a married woman and received in return her notes payable to her husband and indorsed by him and others to the plaintiff. It was held that the note was void *ab initio*; no recovery on the notes could be had against the administrator of the estate of the maker, she being deceased. It was argued that the administrator was estopped to deny the validity of the note, but there being no allegation of fraudulent conduct inducing plaintiff to take the notes, the court held there was no foundation whatever for an estoppel. However, court holds that an action on the common counts in *assumpsit* for money lent or for money had and received could be maintained: *National Granite Bank v. Tyndale*, 57 Northeastern, 1022.

Antenuptial Contract. The New Jersey Court of Chancery in *Russell v. Russell*, 47 Atlantic, 37, makes a pretty thorough review of the law relating to the strict good faith required in the formation of such a contract. The parties, as the books put it with almost unconscious humor, are not treating with each other "at arms' length," and the conduct of the husband to be towards his fiancée in inducing her to enter into such an agreement is most carefully scrutinized. An agreement which deprives her of rights which she would have had under the law in the absence of such agreement throws on the husband the burden of proving that it was

HUSBAND AND WIFE (Continued).

entered into by her with full knowledge of what she was resigning. But no presumption will be raised that the agreement does deprive her of such rights. "It is only when it has been established by sufficient evidence that there is reason to believe that the intended wife has been misled . . . that the burden of proof shifts," and obliges the husband to establish the good faith of the transaction.

INSURANCE.

Although a member of a mutual insurance company is chargeable with notice of the provisions of the company's charter, yet this notice is "of a very vague and shadowy character," and courts are slow to enforce it to the disadvantage of the member. Thus in *Watts v. Life Association*, 82 N. W. 441, the company issued a policy in return for assessments at a lower rate than that allowed by the charter. In an action on the policy, the Supreme Court of Iowa applied the Pennsylvania rule as to *ultra vires* contracts, and held that the company, having received the assessments, could not set up in defence its own violation of its charter. It may be said that, while the decision may appear very fair to Mr. Watts, yet if the courts intend to lay down the rule that each member of a mutual company may persuade the officers to issue him a policy without requiring him to pay sufficient assessments in return for it, a number of receivers will be needed for mutual insurance companies.

Mutual
Insurance
Company,
Violation of
Charter

In *Northern Assur. Co. v. Building Ass'n.*, 101 Fed. 77, an action was brought upon a policy of insurance containing the usual clauses that notice of other insurance must be endorsed upon the policy, and that no agent should have power to waive any provision, etc. The Circuit Court of Appeals (Eighth Circuit) decided that the mere delivery of the policy by an agent who had knowledge of the other insurance and acceptance of the premium by him amounted to a waiver of the breach of the condition, since the clause as to the non-ability of agents to waive conditions was nugatory, as far as it concerned acts done previous to the inception of the contract. This is the view generally taken by the Federal courts, but the dissenting opinion of Sanborn, J., is supported by the case of *Carpenter v. Ins. Co.*, 16 Pet. 495, and by a number of state decisions.

Waiver of
Provision
in Regard
to Other
Insurance

MASTER AND TENANT.

The development of the fellow-servant rule during this century has helped to bring out with greater clearness the duties of a master to a servant, inasmuch as the question whether A. is the fellow-servant of B. is frequently solved by answering the question whether or not to A. have been delegated some of those duties which the master owes to his servants. In such case he cannot under the fellow-servant rule escape liability for their negligent performance by A. This principle is enforced by the United States Circuit Court (D. Montana) in *Ellis v. Northern Pac. Ry. Co.*, 103 Federal, 416, where it is applied to the general duty of the master to provide his servant with a safe place of work. He still remains responsible for failing to do so, though such failure arises through the negligence of another employe, the foreman, to whom he has sought to delegate this responsibility.

The general doctrine with respect to this duty of the master to furnish a safe place of employment, together with the question of how far the servant's knowledge of the insecurity and assumption of the risk affects the matter, is pretty thoroughly discussed in *Mason v. Yockey*, 103 Federal, 265, the United States Circuit Court of Appeals coming to the conclusion that the employe had a right to presume the place of work was safe, and that it was for jury to say how far his knowledge of the facts that tended to render the place insecure and his continuance of work in spite of such knowledge showed contributory negligence.

NEGLIGENCE.

The tendency of the courts to lay down rules in railroad negligence cases as to what constitutes negligence appears in *Hoopes v. West Jersey & Seashore R. Co.*, 47 Atlantic, 27 (New Jersey). In that case plaintiff was driving in a sleigh at night along public highway, and on coming near railroad track, looked up and down to see whether a train was coming. He claimed that, though he saw various lights along the track, he did not notice that any was moving. In fact, one was the headlight of an engine, which struck plaintiff as he drove upon the track. It was held that there being no other danger to distract the plaintiff's attention, he should, in the exercise of ordinary care, have looked with sufficient care to have detected that one of the lights was moving, and then should have waited until reasonably assured that it was safe to cross, and that his not doing so was negligence, which contributed to his injury and prevented a recovery.

**Injury to
Employe, Lia-
bility for Acts
of Foreman.**

**Duty to Fur-
nish Safe Place
to Work.**

**Accident at
Crossing**

NEGLIGENCE (Continued).

Where an explosion on the land of the defendant injures persons or property on adjacent lands, does the rule of *res ipsa loquitur* apply? In *Bradford Co. v. Woolen Co.*, 54 N. E. 528, the Supreme Court of Ohio says that it does apply in the case of an explosion of nitroglycerine; while in *Bishop v. Brown*, 61 Pac. 50, the Court of Appeals of Colorado says that it does not apply in the case of an explosion of a steam boiler, and both courts cite the same authorities and profess to lay down the same propositions of law. Evidently the line is to be drawn somewhere between nitroglycerine and steam boilers—just where, it is hard to say. Injuries resulting from blasting rocks are generally held to raise the presumption: *Rwy. Co. v. Eagles*, 9 Colo. 544.

REAL PROPERTY.

The United States Circuit Court (S. D. New York), in *Pine v. Mayor, etc., of City of New York*, 103 Federal, 337, outlines the rights of a riparian owner to the flow of the water in its natural course, not as an easement or appurtenance, but as "inseparably annexed to the soil" as "parcel of the land itself." It states the rules of the Connecticut court, than which no courts, says the judge in this case, have stated the law more clearly. The case holds that a municipal corporation may not justify its taking of the water from the stream on the ground of public benefit, unless compensation has been made either by agreement or under process of law, and where this has not been done the riparian owner may have even as against it an injunction against the further use of the water, and not merely his remedy at law for damages, since the injury being a continuing one, this latter remedy is inadequate. This is held to be the law, "though the pecuniary damage to the riparian proprietor is not of large amount."

SALES.

In *Standard Furniture Co. v. Van Alstine*, 62 Pacific, 145, the Supreme Court of Washington holds entirely void a conditional sale of certain property where it appeared that the vendor knew that property was to be put to an immoral use. The decision is complicated by the fact that the rights of third parties were involved. Creditors of the vendee having gotten judgment against him, took the property in question on execu-

Illegality of
Purpose for
which
Property is to
be Used

SALES (Continued).

tion. They were then sued by the original vendor, and it was held he could not recover. It seems illogical to hold, as the court does, that the conditional sale is void, and yet that vendor cannot recover the property. If the sale is void no change can have been made in the title and it must remain in him. A more natural construction appears to be that in a contract of sale with reference to an illegal object, the court will intervene in favor of neither party, and hence in this case would not help vendor as against the defendant, who here stood in the shoes of the vendee.

The void character of a contract or conveyance by an insane person is well illustrated in the case of *Bates v. Hymar*, 28 Southern, 567. The Supreme Court of Mississippi there holds that where an insane person has given a note and a trust deed to secure the price of goods he has received, an offer to return the property was not a condition precedent to his right to avoid the deed and escape liability on the note.

TRADE MARKS AND TRADE NAMES.

The disposition of the courts to decide whether commercial labels, wrappers, names etc., do or do not interfere with the prior use of others, depend on whether "the similarity" (between the two) is such as is calculated to mislead the careless and unwary, is well illustrated by the facts in *Monopol Tobacco Works v. Gensior*, 66 N. Y., supp., 155.

But the Circuit Court of the United States (Eastern District of Michigan) holds (*American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. Rep., 281), quoting from a former decision that: "It is the party who uses it [*i. e.*, the trade name] first as a brand for his goods, and builds up a business under it, who is entitled to protection, and not the one who thought of using it on similar goods, but did not use it. The law deals with acts, not intentions."

TRUSTS.

Apparently the addition of the word "trustee" to a grantee's name in a deed should be enough to put the purchaser from him on notice as to nature of the estate conveyed. But under the circumstances of the case of *Rua v. Watson*, 83 Northwestern, 572, the

TRUSTS (Continued).

Supreme Court of South Dakota held that, notwithstanding this designation of the grantee, the purchaser from him for value got a good title. No notice appeared apart from this word in the grantee's deed; and the *habendum* and *tenendum* of the deed, "to have and to hold unto the said party of the second part, his heirs, successors and assigns forever," was held in connection with the other provisions of the deed to give a power of sale to the grantee, though called "trustee." It further appearing that there was an oral agreement that this grantee might sell, but should transfer the money to the grantor, the court held that the grantee had a right to sell, and his vendee took a clear title without any liability to the original grantor, either in reference to selling and the application of the purchase money or otherwise. The court says: "It was incumbent on respondent to prove that appellant had actual or constructive notice of such restriction, and the mere employment of the word 'trustee' after the name of Walker is insufficient to create a trust or operate as notice of any kind to appellant."

In *Treadwell v. Treadwell*, 57 Northeastern, 1016, the Supreme Court of Massachusetts decides that an agreement between trustee and *cestui que trust* is effectual to change trust relation into that of debtor and creditor; and that the payment of interest by the original trustee to *cestui que trust* is inconsistent with a trust relation, but applies to that of debtor and creditor.

Changed to
Relation of
Debtor and
Creditor

WILLS.

Whether a revoking clause in a properly executed will is of effect from the date of the execution of the will, or is merely ambulatory and stands or falls with the will is a question which has not always received the same answer. It directly arose in the Supreme Court of South Dakota, and the court holds, without a discussion of the point, that the revocation is complete, though the revoking will is not found at the death of the testatrix. In *re Bell's Estate*, 83 Northwestern, 564. In that case testatrix had made two wills, each containing a clause revoking all prior wills. At her death only the earlier will was found. It was held, however, that, though the later will must be presumed to have been destroyed by the testatrix *animo revocandi*, nevertheless the earlier one could not stand, it having been made null and void by the revoking clause of the will which was subsequently destroyed.

Revoking
Clause in
Destroyed
Will

WILLS (Continued).

Palmer v. Munsell, 46 Atl. 1094, is a remarkable decision. A bequest was made "to my niece, — W." The testator had a niece, A. W., and two grandnieces, her daughters, B. W. and C. W. In a former clause of the will he had left a bequest to B. W., styling her "my niece." The Court of Chancery of New Jersey decided that this was a case of a latent ambiguity, and that, since the testator had called B. W. his "niece," it was to be presumed that the other bequest referred to his other grandniece, C. W., and not to his niece A. W. It would certainly seem that there was no latent ambiguity in the bequest, since the real niece, A. W., answered the description, and was the only person who did so; therefore there was no room for construction.

In *Healy v. Healy*, 66 N. Y. Supl. 82, the decedent promised the parents of the plaintiff that if they would allow the plaintiff to live with him, he would leave her, at his death, a child's share of his property. The Supreme Court of New York decided (1) that there was a sufficient consideration for the contract to make the will, by the release by the plaintiff's parents of her custody to the decedent; (2) that twenty years' residence with the decedent by the plaintiff was sufficient performance to take the case out of the statute of frauds; and (3) that the fact that the decedent had a child born subsequent to the contract did not deprive the plaintiff of her right, but operated merely to cut down her share.

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MAY A DESERTED HUSBAND LAWFULLY COMMIT ADULTERY? *Ristine v. Ristine*, 4 Rawle, 459, (1834). This somewhat startling query has apparently been answered in the affirmative by the courts of this state, so far, at least, as divorce cases are concerned. Of course, adultery, even by a deserted husband, is followed by criminal liability. But the proposition seemingly announced by our courts is that A, being deserted by B, his wife, may thereafter commit adultery, and notwithstanding his crime or crimes, obtain a divorce from his wife on the ground of desertion.

A sued B, his wife, for a divorce on the ground of desertion. B's answer alleged that A, since their separation, had lived in adultery with C. A's demurrer to this answer was overruled by the lower court. Decree reversed: *Ristine v. Ristine*, 4 Rawle, 459, (1834), Kennedy, J.

After desertion by his wife, the libellant lived with another woman in adultery. *Held*, that this was no bar to his obtaining a divorce on the ground of desertion: *Shoemaker v. Shoemaker*, 1 York, 133, (1880), Fisher, P. J.

In a libel for desertion, evidence of libellant's adultery subsequent to the desertion was ruled out and a divorce granted: *Leidig v. Leidig*, 2 D. R., 529, (1893), Reeder, J. *Larson v. Larson*, 3 Kulp, 215, (1884), Rice, P. J.; s. c. 14 Luz. L. Reg. 7 is to the same effect.

The question has not been mooted in the Supreme Court since 1834, but the Superior Court, so late as January 17, 1900, in an opinion by William W. Porter, J., approved *Ristine v. Ristine*, saying: "Adultery itself by a libellant after desertion by the respondent does not deprive the libellant of his right to a decree for desertion: *Ristine v. Ristine*, 4 Rawle, 459:" *Mendenhall v. Mendenhall*, 12 Pa. Sup. Ct. 297.

This astounding statement, shocking alike to one's chivalrous instincts and preconceived notions of the law, is based upon a construction by Justice Kennedy in 1834 of the Act of March 13, 1815, 6 Sms. L. 286, 1 P. & L. Dig. 1633, permitting the "innocent and injured party to obtain a divorce from the bond of matrimony" in certain cases. The seventh section of that act is as follows:

"In an action or suit . . . for a divorce for the cause of adultery, if the defendant shall allege and prove

- (a) that the plaintiff has been guilty of the like crime, or
- (b) has admitted the defendant into conjugal society or embraces after he or she knew of the criminal fact, or
- (c) that the said plaintiff (if the husband) allowed of the wife's prostitutions, or received hire from them, or exposed his wife to lewd company, whereby she became ensnared to the crime aforesaid, it shall be a good defence and a perpetual bar against the same."

Thus were the three great principles of Recrimination, Condonation and Connivance recognized by our statutes.

But Justice Kennedy, reading the act and finding that it in words refers only to actions for adultery, applies the maxim "*expressio unius est exclusio alterius et expressum facit cessare tacitum*" and thereby in effect adds two additional clauses.

1. *None of these defences shall be allowed in an action for any cause other than adultery.*

2. *These shall be the only defences allowed in an action for adultery.*

Can this construction possibly be maintained? Is an adulterer, amenable to the criminal law, an "innocent and injured party" who can obtain relief *in foro conscientie* in respect of his marriage bond, against which he himself is the chief sinner?

Can a wife be compelled to return to a man whose arms are yet warm with the embraces of another woman? Can it be that a wife who, smarting under an indignity, as in *Hardie v. Hardie*, 162 Pa. 229, (1894), has left her husband, must return to him though the very next day he commits adultery and contracts syphilis?

To affirmatively answer these questions it must be contended (a)

that he who cometh into equity need *not* have clean hands and (b) that the criminal husband may profit by his own wrong.

It is difficult to see how Mr. Justice Kennedy reached the conclusion that the Act of 1815 must be construed entirely without reference to settled legal principles. A similar mistake, in an entirely different field of law, was corrected by Mr. Justice Mitchell, in *Bank v. Bank*, 159 Pa. 49, (1893).

A careful reading of *Middleton v. Middleton*, 187 Pa. 614, (1898), marking as it does an advance of sixty-eight years in the law of domestic relations, gives color to the belief and hope that *Ristine v. Ristine* would not be followed to-day by our Supreme Court. It must be borne in mind that in *Ristine v. Ristine* the libellant's adultery took place more than two years after the respondent's alleged desertion. The desertion was then an accomplished fact, and, in one aspect, the cause of action was perfect. That cause of action, however, is "Wilful and malicious desertion and absence from the habitation of the other without a reasonable cause, *for and during the space of two years*:" Act of March 13, 1815, 6 Sm. L. 286, 1 P. & L. Dig., 1633; and each of these ingredients must be established: *Angier v. Angier*, 63 Pa. 450, (1870). Desertion, therefore, is a continuous offence, with a *locus pœnitentiæ* covering two years, and any act done by the "innocent and injured party" during those two years which makes a return abhorrent and impossible tolls the statute and prevents the original wrongful act from ripening into a cause for divorce. Adultery must therefore be a complete defence. But if adultery is *ever* a defence in proceedings for desertion, the theory of *Ristine v. Ristine* is exploded and the case of necessity falls.

It would seem that if the wife proceeds against her husband for adultery, prior to any decree in her husband's libel against her for desertion, the desertion would be no defence. And yet judgment could not be given in favor of the libellant in both cases.

It is pleasant to note that similar statutes have received what seems to be a more reasonable construction in Massachusetts and Missouri: *Moors v. Moors*, 121 Mass. 232, (1876); *Nagel v. Nagel*, 12 Mo. 53, 55, (1848). As was said in the Missouri case: "Which party has a right to apply to the Court to set aside and vacate the marriage contract, when both parties have been guilty of a breach thereof?"

In other jurisdictions subsequent adultery is a perfect defence: *Reid v. Reid*, 21 N. J. Eq. 331, 333, (1871); *Hale v. Hale*, 47 Tex. 336, (1877); *Smith v. Smith*, 4 Paige, 432, 438, (1834); *Brisco v. Brisco*, 2 Add. Ec. R. 259, 2 Eng. Ecc., 294, 298, (1824). Bishop criticises *Ristine v. Ristine* as follows: "This case is authority also for a still more questionable doctrine, namely, that desertion continued for the statutory period is sufficient for divorce, though, during the later part of the time, it was justifiable by reason of the deserted party having subsequent thereto committed adultery. The contrary of this was laid down in Massachusetts: *Clapp v. Clapp*, 97 Mass. 531 (1867)."¹

¹ Bishop on Marriage and Divorce, 190, (1891).

Recrimination is as old as the Mosaic law,¹ and has been defined to be "a showing by the defendant of any cause of divorce against the plaintiff in bar of the plaintiff's cause of divorce;"² and again as "the defence that the applicant has himself done what is ground for divorce either from bed and board or from the bond of matrimony."³ As was well said by Lord Ardmillan:⁴ "Divorce is, in my opinion, a remedy provided for the innocent party, and is not intended for cases in which both parties are guilty." "The doctrine," says Lord Stovell, "has its foundation in reason and propriety. It would be hard if a man could complain of the breach of a contract which he has violated . . . The parties may . . . find sources of mutual forgiveness in the humiliation of mutual guilt."⁵ They are "suitable and proper companions," two miserable wretches, to be dismissed summarily from the consideration of the Court.⁶ A person guilty of a breach of the marriage vow should not have the assistance of the Court to enforce *any marital right*.⁷

The authorities hold, as the result of the continuing nature of desertion, that desertion which has not lasted the statutory time before the commission of adultery is no bar to a divorce on the latter ground: *Wilson v. Wilson*, 40 Iowa, 230, 232, (1875); *Dupont v. Dupont*, 10 Iowa, 112, 114, (1859); *Hall v. Hall*, 4 Allen, 39, 40, 41, (1862); *Adams v. Adams*, 17 N. J. Eq. 324, 328, (1866). It would seem to follow that in case of cross libels, where a deserted husband had committed adultery within the statutory period, there might possibly be a decree in favor of the wife.

The English rule is that if the complaining party has been guilty of adultery, even though committed after bringing of the suit, or after a decree *nisi* dissolving the marriage, but before it is made absolute, a divorce will not be granted: *Hulse v. Hulse*, L. R. 2 P. & D. 259, (1871); *Barnes v. Barnes*, L. R. 1 P. & D. 572, (1868); *Robinson v. Robinson*, L. R. 2 P. D. 75, (1877); *Ravenscroft v. Ravenscroft*, L. R. 2 P. & D. 376, (1872); *McCord v. McCord*, L. R. 3 P. & D. 237, (1875); *Otway v. Otway*, L. R. 13 P. & D. 141, (1888).

On principle and authority, Bishop's broad statement of doctrine should be accepted as sound:

"It is a bar to any suit to dissolve a valid marriage, or separate the parties from bed and board, that either before or after the complained of delictum transpired, the plaintiff did what, whether of the like offending or any other, was cause for a divorce of either sort:" 2 Bishop, 174, and cases cited.

Ira Jewell Williams.

September, 1900.

¹ Deut. xxii, 13-19.

² Stewart on Marriage and Divorce, 277 and cases cited.

³ 2 Bishop, 165.

⁴ Brodie v. Alexander, 8 Scotch Sess. Cas. 3d Ser. 854, 856, (1870).

⁵ Beeby v. Beeby, 1 Hag. Ec. 789, 790, 3 Eng. Ec. 338, 339, (1799).

⁶ Chancellor Walworth, in Wood v. Wood, 2 Paige, 111, (1830).

⁷ Horne v. Horne, 72 N. C. 530, 533, (1875).

⁸ Hope v. Hope, 1 Swab. & Tr. 94, 107, (1858).

ANTICIPATORY BREACH OF CONTRACT—STATUTE OF LIMITATIONS.—*Henry v. Rowell*, 64 N. Y. Supp. 488 (1900). The doctrine is now well established in the law, that the renunciation of a contract by one of the parties before the time for performance has come discharges the other, if he so choose, and entitles him at once to sue for a breach—*Hochster v. De la Tour*, 2 E. & B. 678 (1853); *Frost v. Knight*, L. R. 7 Exch. 114 (1872). A very recent case in New York, *Henry v. Rowell*, 64 N. Y. Supp. 488 (1900), involves an additional point of great interest, and seeks to answer the question: *Must* the promisee bring suit immediately upon the anticipatory declaration by the promisor of an intention to break the contract in order to prevent his action being barred by the Statute of Limitations? Or, to express the problem more concisely: Does the Statute of Limitations begin to run from the time of the promisor's announcement of his intention to disregard the contract, or does it run only from the time when the promisor was to have performed his part of the contract and failed to do so?

The case arises upon the following facts: The plaintiff entered into a contract with his sister (the defendant's decedent) in 1872. By the terms of the agreement the plaintiff was to board and lodge his sister in his household as long as she should live, and she in return was to devise to the plaintiff by will all the property she should own at the time of her death. In 1884, however, she left the plaintiff's household and took up her permanent abode elsewhere. She died in 1898, leaving the plaintiff a merely nominal sum, and devising the great bulk of her property to others. The plaintiff then brought suit against her executor for damages sustained by decedent's breach of contract, estimating those damages on a *quantum meruit* for board and lodging furnished from 1872 to 1884. The defendant pleaded the Statute of Limitations on the ground that the plaintiff's right to sue accrued when the decedent left his household in 1884, and could not therefore be brought after 1890.

The court gives judgment for the defendant. It takes the ground that the decedent's termination of her relation of boarder to the plaintiff was in itself notice to him that the contract was not to be carried out by her, and that therefore his right of action accrued immediately. It draws a distinction between the present case and those cases (such as *Hochster v. De la Tour* and *Frost v. Knight*, *supra*) where the performance of the contract has not yet been entered upon, but is to occur or be begun at a future time, and notice of a refusal to perform is given by one party in advance. In such cases, although the other party *may* treat such advance notice as a breach and bring an action therefor at once, it seems that he may instead treat the contract as continuing in life until the contract day, and sue for the final breach made on that day. Even in those cases, the court deems it doubtful whether the Statute of Limitations would not be held to run from the time the advance notice of a refusal to perform is given. But "however that may be," says the court, "in cases like the present one, where the contract is broken while it is being performed by the parties, the cause of action for the breach which arises at once is the only cause of action which accrues."

That the contract is not yet completed is no reason for postponing the commencement of the action to the time when it would be completed if carried out, and reckoning the running of the statute from that time. The plaintiff here was not at liberty to continue to treat the contract as in life until the decedent's death."

The opinion of the court rests, not on any satisfactory legal reasoning, but on the authority of *Bonesteel v. Van Etten*, 20 Hun. 468 (1880), which overruled the prior case of *Quackenbush v. Ehle*, 5 Barb. 469 (1849). In *Bonesteel v. Van Etten* (where the facts were almost identical with those in the present case) it was held that if services are rendered on a promise that certain property shall be devised to the person rendering them by the will of the person for whom they are rendered, and the services contracted for are not completed because the person is prevented from completing them by the promisor, the promisee's right of action upon *quantum meruit* accrues immediately upon the promisor's renunciation of the contract by such prevention, and is barred in six years from that date. It seems to the present writer, however, that although on the facts of these cases the court decreed the proper judgment, it did so merely fortuitously; that there is no real distinction such as the court seeks to draw between *Hochster v. De la Tour* and *Henry v. Rowell*, and that the court in the latter case seeks in its dicta to generalize principles laid down in *Bonesteel v. Van Etten*, although the latter were meant to apply only to actions on *quantum meruit* for services actually rendered. An important distinction would appear to exist, which the court has failed to note, but which, if observed, would not only clarify the law upon this troublesome point, but also be eminently just and in accordance with legal principles, applying to the whole line of cases of which *Hochster v. De la Tour* was the first.

In a case like *Henry v. Rowell* the plaintiff might, it would seem, bring either one of two kinds of actions. He might sue (as he in fact did) upon a *quantum meruit* for board and lodging furnished to the defendant's decedent. That is to say, he could ignore the express contract entered into with, and broken by, her, and allow the law to assume for him, as it does, that the decedent had, by implication, promised him that if she at any time should break her express contract and leave his household, she nevertheless would be indebted to him in an amount to recompense him for the food, labor, etc., expended by him in boarding and lodging her while she remained. This implied contract would be totally distinct from the express contract, and the right to sue on it as on a *quantum meruit* would accrue, of course, when the labor (to recompense the furnishing of which the law raises the implication) ceased. In the present case the defendant's decedent left the plaintiff's house in 1884. If, therefore, he wished to recover on the promise implied by law to be paid for work done and goods furnished prior to that time, he must sue before barred by the statute in 1890. The time when the sister died and failed in her will to perform her part of the express agreement entered into by her with the plaintiff, would not affect the question, because the plaintiff is not suing on this express agreement, and therefore its actual time of performance would in no wise determine

the running of the Statute of Limitations with regard to the action on the *quantum meruit*.

There remains, however, the other possibility which the court seems to have confused. Suppose, instead of on a *quantum meruit*, the plaintiff were to sue on the express contract. The dicta of the court in both *Bonesteel v. Van Etten* and *Henry v. Rowell* would seem to hold here also that the statute would run from the time the defendant's decedent, by leaving the plaintiff's household, practically renounced the contract and gave notice to him that she would not devise her property to him upon her death as she had agreed to do. It seems to the writer that, on the express contract, the statute should not be held to run until the time for performance actually arrives, i. e., until the sister's death. It is true that the plaintiff might, if he chose, bring action at once upon her announced prior renunciation, as in *Hochster v. De la Tour*. But *Avery v. Bowden*, 5 E. & B. 714 (1855), is an express authority for the doctrine that even if the defendant did renounce the contract prior to the arrival of the time of performance, such renunciation might be disregarded by the plaintiff, at his option; he might, if he so desired, keep the contract alive until the time for performance arrived, and if the defendant did not then perform, an action would lie, not for the prior renunciation, but for the failure to perform. In the present case, if the plaintiff wished to do this, he might claim as damages the difference between the value of the property left by his sister at her death (which she was to have devised to him) and the cost to which she would have been subjected had she continued to board with him for life. Such an estimate would meet the requirement laid down in *Robinson v. Harman*, 1 Exch. 855 (1848), for measuring damages, viz., that "where a party sustains a loss by reason of a breach of contract, he is to be placed in the same situation, with respect to damages, as if the contract had been performed."

If therefore the plaintiff, instead of suing immediately upon a *quantum meruit*, would prefer to take the above method of estimating his damages, suing on the express contract, it is evident that such an action could not accrue until the time for performance actually arrived, and that therefore the Statute of Limitations could be construed as running only from the time of the sister's death. For, in the first place, the contract stipulated that she was to devise to him whatever property she owned at the time of her death, and of course until that time arrived this property would be an unknown quantity, and therefore the plaintiff could not liquidate his damages. In the second place, it is possible that the sister may have voluntarily released the plaintiff from his share of the contract, and, although leaving his household, she may have entertained no idea of failing to devise him her property. Or she may have had such an idea, but repented before the time for performance arrived. Why therefore should the plaintiff, instead of bringing a *quantum meruit* action, not be allowed to wait until the time for performance actually arrives, and then, if the promisor fails to perform, bring an action for damages on the *express* contract?

This option, if allowed, would not only be advantageous to both

parties, but would follow the law as laid down prior to *Bonesteel v. Van Etten*, while even in that case the decision that the statute runs immediately from the promisor's renunciation of the contract applied only to the fact that the action in that case was, not on the contract itself, but on a *quantum meruit*. The distinction contended for is hinted at in Wood, Lim. Act, § 120, when he says: "Where a person employed under an entire contract is discharged before its completion, his right of action for wages *already earned* accrues at once (*Bonesteel v. Van Etten*); but his claim for damages does not accrue so as to become complete, and consequently so that the statute will run against it, until the term for which he was originally employed was ended; for while he may bring an action at once for such damages as he has sustained, yet he thereby waives all future damages, and he has a right to wait until the period is ended, and sue for the damages he has actually sustained from the breach of the contract." In *Hochster v. De la Tour*, *supra*, it is laid down that "it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer." And in *Frost v. Knight*, *supra*, it is stated that "The cases show that the promisee may, if he pleases, treat the notice of intention as inoperative, and await the time when the contract is to be executed and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive, for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it."

The plaintiff, in *Henry v. Rowell*, seems to have brought his action on a *quantum meruit*. Therefore the court was undoubtedly right in giving judgment for the defendant, since such action was barred by the statutes within six years from the time the defendant's decedent left the plaintiff's house, and the plaintiff's services consequently ceased. But to draw, as the court does, a distinction between this case and the general one of *Hochster v. De la Tour* is highly confusing, and to lay down the general rule without qualification, that the statute runs from the promisor's announcement of an intention to break his contract, instead of from the breach itself, when the time for performance arrives, is as logical as to say that the statute in trover runs from a thief's announcement of his intention to steal goods, instead of from the actual conversion of the property itself. The true rule, foreshadowed by the previous cases, but confused in the dicta of *Henry v. Rowell*, would seem to be this: That, under the circumstances of *Henry v. Rowell*, the plaintiff

should be allowed either to sue on a *quantum meruit* for services actually rendered, which action would be barred within six years from the time those services ceased; or to wait until the promisor (the defendant's decedent) failed to leave her property to him in her will, and then, at her death, to sue on the express contract for the actual loss sustained by her failure to do so,—viz., the value of the property left by her, minus the expense to which he would have been subjected had she boarded and lodged with him for life. The latter action, which very evidently differs from that brought in *Bonesteel v. Van Etten* and apparently in *Henry v. Rowell*, ought not to be barred by the statute until six years after the death of the sister, and non-performance of her part of the contract.

H. S.

BANKS—CHECKS—ASSIGNMENT OF FUND.—*Henderson v. U. S. Nat. Bank*, 80 N. W. (Neb.) 898 (1899).—In this case the plaintiff was payee of a check drawn on the A bank, which check was deposited with the B bank for collection, and by it forwarded to the C bank for collection, and by it forwarded to the D bank for collection and by it collected. The amount of the check was \$716.22. The D bank, in returning the amount of the said check, drew its check on the C bank payable to the cashier of the C bank. On the day the check was received the D bank had on deposit with the C bank only \$569.82. Immediately after the receipt of the check the C bank applied the funds of the D bank on deposit in payment of certain unmatured debts of the D bank to the C bank and dishonored the check because of insufficient funds.

Plaintiff thereupon demanded payment of the amount of deposit with the C bank in favor of the D bank at the time of the reception of the check, and upon refusal brought this action against the C bank for the recovery of the amount of the check, which resulted in a judgment for the defendant bank.

The plaintiff, on appeal, contended (1) that the check of the D bank on the defendant operated as an assignment of the former's deposit with the latter in favor of the plaintiff, and that, as against him, the defendant could not apply the amount of deposit to the unmatured debts of the D bank; (2) that if the check was an assignment of the whole sum named therein, the defendant could not refuse payment of the amount on deposit even though less than the amount called for in the check.

Chief Justice Harrison, in his opinion, affirmed the plaintiff's first proposition, quoting the decision of the same court in *Fonner v. Smith*, 31 Neb. 107: "A check drawn on funds in a bank is an appropriation of the amount of the check in favor of the holder thereof—in effect an assignment of the amount of the check—and the holder, upon refusal of the bank to pay the same where such funds have not been drawn out before its presentation, may bring an action thereon in his own name." However, the learned judge restricted the scope of the above principle to those cases only where the amount in bank exceeds the amount stated in the check. In the

light of this qualification we have the court's decision in the following words: "The check being for a greater sum than stood to the credit of the drawer, the bank was under no obligation to pay the check or to make the partial payment."

From the foregoing we gather that the real question determined in this case was that, irrespective of the question concerning the contractual relations of the bank with the holder, no bank can be compelled to honor a check unless the depositor's account equals or exceeds the amount called for in the check, nor is it necessary to pay over the amount then on deposit, being less than the sum called for in the check.

What is a check but an order by the depositor directing the bank to pay a particular portion of the deposit? If a bank cannot be compelled to pay an amount in excess of the order or check, how could it be compelled to pay an amount less than the check names? This seems to be good law supported by numerous authorities. *In re Brown*, 2 Story 512 (1843); *Coates v. Preston*, 105 Ill. 473 (1883); *Dana v. Third Nat. Bank of Boston*, 13 Allen (Mass.) 446 (1866).

Standing out in distinct contrast with this view and these authorities is *Bromley v. Bank*, 9 Phila. 522 (1872), where a check in excess of the amount in bank was dishonored, and yet the bank was compelled to pay the amount then on deposit. Pierce, J., says: "The cases treat a check on a banker as an equitable assignment or appropriation. . . . It follows as a consequence that if such a check is an appropriation of the whole sum for which it calls it is an appropriation of any smaller sum which may be in his hands, if there be not sufficient to pay the amount of the check."

The only possible distinction between this and *Henderson v. Bank* is that in the former an offer was made by the holder to deposit a sufficient sum to make it equal with the check. But the fallacy of that ground is apparent when we recall that a bank can inform a third party of the state of its drawer's account only at its own peril. *Foster v. Bank of London*, 3 F. & F. 214 (1862).

Thus we observe that while these two cases are identical in their premises they are directly opposed in their conclusions. Moreover, a glance at the authorities in the United States and England reveals the anomaly that in the majority of jurisdictions the conclusions that a bank need not pay an overdraft are identical, but the premises, that a check is an assignment of the fund, are directly opposed to each other. This clash in the authorities over the rights of the check holder is worthy of note. It is held, on the one hand, that no action will lie because there is no privity of contract between the holder and the bank until the check is presented and accepted by the bank. The leading case of *Bank of the Republic v. Millard*, 77 U. S. 156 (1869), has been religiously followed down to the present time in the majority of jurisdictions. Mr. Justice Davis said: "How can there be such privity when the bank owes no duty and is under no obligation to the holder. The holder takes the check on the credit of the drawer in the belief that he has funds to meet it, but in no sense can the bank be connected with the transaction." The attitude of the

Pennsylvania Supreme Court is clearly put by Mr. Justice Green in *First Nat. Bank v. Shoemaker*, 117 Pa. 94 (1887): "It has been repeatedly held that the holder of a bank check has no right of action against the bank. . . . *Saylor v. Bushong*, 100 Pa. 23; *Northumberland Bank v. McMichael*, 106 Pa. 460 (1884); *Bank v. Millard*, 10 Wall. 152 (1869). In *Harrisburg Nat. Bank's Appeal*, 10 W. N. C. 137 (1881), we said that an ordinary bank check is neither an equitable assignment nor appropriation of the corresponding amount of the drawer's fund in the hands of the drawee. It gives the payee no right of action against the drawee nor any valid claim to the funds of the drawer in his hands." While the weight of authority follows this theory, it seems that it is based upon a technicality, for what after all is privity but a thing which the law manufactures whenever it sees fit?

The other class of cases is grounded on the theory of an implied promise by the bank to the check holder arising from the well-known usages of banking business. Chief Justice Caton gives the key to the situation in *Munn v. Burch*, 25 Ill. 35 (1860): "Universal custom shows us that the banker, when he receives the deposit, agrees with the depositor to pay it out on the presentation of his checks, in such sums as those checks may call for and to the person presenting them, and with the whole world he agrees that whoever shall become the owner of such check shall, upon presentation, thereby become the owner and entitled to receive the amount called for by the check, provided that the drawer shall at the time have the amount on deposit." This theory is followed in Illinois, Nebraska, Iowa, Kentucky and South Carolina. Its fallacy has never been pointed out, its argument never answered. On the other hand, we think the argument in *Bank v. Millard* is refuted by the fact that the privity deemed so necessary by Justice Davis is created by the implied promise held out to the world, by the bank on the one side and the presenting of the check on the other.

Many text writers, after a careful study, conclude in favor of the holder's right to sue. *Morse on Banks and Banking* (2d ed.), §480; *Daniel on Negotiable Instruments* (4th ed.), Vol. 2, §1638; 4 *Kent Com.*, 549, note 4th ed.; *Byles on Bills*, 18.

We believe the courts are slowly coming to realize the hardship of the present state of the law, and, in conformity with the demands of business customs, are beginning to shift the foundation of their decisions from one imbedded in the sands of mere technicality to one imbedded in the rock of sound reason, which has for its object the promotion of justice, security of good faith and convenience in transacting business.

F. W. S.

BOOK REVIEWS.

THE LAW OF ROADS AND STREETS. By B. K. and W. F. ELLIOT.
Indianapolis: The Bowen Merrill Company. 1900.

"It has been our purpose to make a book that shall be practically useful, and to that end our labors have been directed." We take these words from the preface to the first edition of the valuable work before us, in order to show just what purpose animated the authors. Some works are written with a view to a theoretical inquiry into legal fictions or legal entities, but the work under consideration has been animated by one thought, that of practical utility. That it has been a success is undoubted; to say that it has served its purpose is therefore no mean praise.

A second edition, the one on our table to-day, attests the popularity of a work which, though special in the main, deals with a number of cognate subjects, such as bridges, street railways and railway crossings. It is ten years since the first edition was printed and since then judicial decisions, statutes, even written constitutions, have settled many points disputed at that time and have also changed the law in many respects, so many respects, indeed, that some adjudged cases have yet to be confirmed by higher courts before they will become of any value.

Some idea of the size and scope of the volume may be gained from the fact that the table of cases alone covers 129 pages of small type. While it was impossible to include every rule in every state on these subjects treated in this work, mention should have been made of the Pennsylvania rule that where land is bounded by an unopened street, the grantee of land so bounded takes title to the side only, where that side is mentioned as his boundary. His title jumps to the middle of the street only when the street is opened, not before; so that damages in such cases are rarely allowed. *Hancock v. City of Philadelphia*, 175 Pa. 124 (1896).

Typographically the work is all that could be expected; the section headings and the index are of particular assistance.

J. M. D.

THE LAW OF OPERATIONS PRELIMINARY TO CONSTRUCTION IN ENGINEERING AND ARCHITECTURE. By JOHN C. WAIT. New York: John Wiley & Sons. 1900.

The author of this unique work took his M. C. E. at Cornell and his LL. B. at Harvard; his engineering and his legal training, therefore, were of the best and qualify him to be an authority on matters requiring a knowledge of both subjects. A few years ago he published a work on "Engineering and Architectural Jurisprudence,"

which was so successful that he was emboldened to take up the task which has borne such good fruit in the work now before us. "The earlier book," to quote from the author's preface, "was a presentation of the law of construction, while this treats of the law attending those operations which precede construction."

When we reflect for a moment on the vast public enterprises which are daily set on foot around us, we can easily see that a knowledge of the law, in some of its branches, at least, is almost indispensable to an engineer of any prominence. Take, for example, an enterprise which has for its object the conveyance of a suitable water supply to a great city from a distance. How minute must be the consulting engineer's knowledge of the myriad branches of the law of property! He must know something about deeds and conveyances and of the determination of boundaries, not only by surveying, but by the law courts after the surveyor has long finished his task; he must keep in mind the rights of riparian owners,—in fact, all the law in regard to surface and subterranean streams; he must know something of rights of way and other easements and incorporeal rights, to say naught of franchises. To make a complete list of all such requirements would be to make a list of the chapter and section headings of Mr. Wait's work. It may be urged that all this could be well enough left to the lawyer; not to-day, however, for a man who is now managing such an undertaking must be able to decide legal questions as well as to solve engineering problems. If a lawyer had always to be consulted, the enterprise would lag. Moreover, he would be a lawyer merely and would at times be unable to grasp what the engineer could see at a glance. For such an engineer, indeed, for all engineers, Mr. Wait's work is invaluable; nor is it by any means amiss in a lawyer's office.

The citations are numerous and accurate, though dates might sometimes well be inserted; the book also represents all the latest improvements in typography.

J. M. D.

OUTLINE STUDY OF LAW. By J. F. RUSSELL, D. C. L., LL. D.,
Professor of Law in New York University. Third edition. Baker,
Voorhis & Co., New York, 1900.

Any one who expects to find in this book a labored and dreary exposition of salient points of jurisprudence will be pleasantly disappointed. Instead he will find, woven into the warp of a more or less scientific arrangement of topics, a pleasing woof of informal lectures, or *chats*, which will interest and stimulate him. Upon a background of eminent common sense he will perceive the large figures of a deep learning, shot here and there with brilliant threads of wit and humor. We can imagine no better book to be put into the hands of one contemplating the study of law or even of one who has made some progression in it. To laymen of intelligence it will prove pleasant and profitable reading because of the large culture it displays and the happy way of putting legal thought. To the

lawyer it will be of interest and of charm by reason of its clear and sane way of stating things and its piquant phrases and expressions. It is not our purpose to discuss this meritorious book at length—that has already been done for previous editions by THE AMERICAN LAW REGISTER. We simply wish to call attention to its excellence. It is well worth a place in any library, and must be read with interest and instruction by every serious-minded person. We even venture to think that persons who never read anything “heavier” than the current novel will find it not altogether tiresome.

E. B. S., Jr.

BOOKS RECEIVED.

[Acknowledgment will be made, under this title, of all books received, and reviews will be given, as near as possible, in the order of their receipt. Those, however, marked * will not be reviewed. Books should be sent to the Editor-in-Chief, Department of Law, University of Pennsylvania, S. W. Cor. Thirty-fourth and Chestnut Streets, Philadelphia, Pa.]

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TRADE ORGANIZATIONS FOR THE COLLECTION OF DEBTS DUE MEMBERS BY MEANS OF BOYCOTT.

In the course of his opinion in the case of *Bohn Mfg. Co. v. Hollis*,¹ decided in 1893, Justice Mitchell, of the Supreme Court of Minnesota, observed :

"This is the age of associations and unions in all departments of labor and business for purposes of mutual benefit and protection. Confined to proper limits, both as to ends and means, they are not only lawful but laudable. Carried beyond these limits they are liable to become dangerous agencies for wrong and oppression. Beyond what limits these associations cannot go without interfering with the legal rights of others is the problem which, in various phases, the courts will doubtless be frequently called to pass upon."

Two cases decided during the current year, namely, *Weston v. Barnicoat*², in the Supreme Court of Massachusetts, and *McIntyre v. Weinert*,³ in the Supreme Court of Pennsylvania, furnishes illustrations of a lately developed scheme of combination among traders, which, in one phase,

¹ 55 N. W. Rep. 1119.

² 56 N. E. 619.

³ 195 Pa. 52.

gives rise to the legal problem mentioned by the learned judge in the language just quoted, and these cases may serve as a text for a brief discussion of the subject of this article.

In each case the plaintiff based his action on the ground that the defendant had resorted to unlawful methods for the collection of a debt alleged by the defendant to be due him from the plaintiff; the methods being the "black-list" and "boycott" (using the terms in their popular sense), made effective through the agency of an organization of which the defendant was a member. The scheme of the organization was to bring about a combination of all wholesale dealers in a particular branch of trade in a given locality so that retail dealers, of which plaintiff was one, in the same branch, and carrying on business in the same place, would be dependent for their supplies upon members of the combination. When a retail dealer was reported by any member of the organization as having refused after a certain time to pay a debt alleged to be due the latter, his name was entered upon a list known as the "black-list," which was sent to all members of the combination, who, after receiving it, were obliged under the rules of the association to thereafter refuse to sell supplies to the alleged delinquent, either on credit or for cash, until notified that his indebtedness had been discharged.

The effectiveness of this boycott system of collecting debts, where the combination is strong enough to establish a monopoly in a particular branch of trade, is perfectly apparent, and it is not surprising that the plan has been widely adopted by wholesale dealers in the various commodities, which are the subjects of modern commerce. The tendency of the times is towards the concentration of each branch of trade in a few hands, and the monopoly, which is necessary to the success of the plan, is thus the more easily established.

To what extent, if at all, the plan itself should receive the approval of the courts is therefore a question of present importance, and if the decisions cited give any aid in its solution, they are worthy of careful study.

The facts of the Massachusetts case of *Weston v. Barnicoat* are well stated in the report of the case as follows:

"This is an action of tort brought against a member of an association of the type considered in *Hartnett v. Associa-*

tion (169 Mass. 229) for using the machinery provided by the Association's by-laws. The defendant made a claim against the plaintiff for the price of a granite monument, which the plaintiff declined to pay. The defendant thereupon notified the plaintiff that if the plaintiff did not pay he should report the plaintiff's name to the Association, to be placed upon its records of those who did not pay their honest debts. The plaintiff not paying, the defendant notified the local secretary, and thereupon the plaintiff received a letter from the Association, urging him to settle or explain, with the threat of placing his name upon the record if he did not. The consequence of placing a name upon the record or black-list was a boycott by the Association, as the plaintiff was notified by a copy of the following by-law: 'No member of this Association shall quote prices or do any work, either directly or indirectly, for any person or persons whose name appears on the list.' The plaintiff did not pay, and a little later his name was placed upon the list with the anticipated result, and with the effect of serious damage at least to the plaintiff's business. The plaintiff thereupon brought this action for causing the circulation of the report and had a verdict."

The case was treated as an action of libel, the defamatory publications being the notice, that plaintiff refused to pay a debt due defendant, sent by the defendant to the Association, and the "black-list" containing the name of plaintiff among the names of those persons "who did not pay their honest debts."

The defendant set up as a defence the truth of the alleged libel and also that the communications complained of were under the circumstances privileged. The exact issues of fact, which were determined by the jury, did not appear from the record, and the Court of Appeal therefore discussed the several grounds on which the verdict could be justified. The truth of the alleged libel having been set up, it became a controverted question at the trial whether or not the plaintiff was actually indebted to defendant, but the Appellate Court, in sustaining the verdict, did not rest its conclusion on the assumption that this question of indebtedness had been determined by the jury in favor of the plaintiff. On the contrary, the court in its opinion said :

"Even if there was a debt, however, the plaintiff might have recovered upon one of several grounds, that the publication imported a general habit on the part of the plaintiff of not paying his debts (whether it had that meaning was one question to be left to the jury) or that although there was a debt there was a counter-claim in recoupment, which manifestly justified the plaintiff in not paying until it was adjusted, or that the publication was caused with malicious intention."

It should be noted that while defendant had only one claim against plaintiff, as appeared from the evidence, his name at the instance of defendant had been placed on a record of those "who did not pay their honest debts." The court might therefore have held, if it concluded that the plaintiff must recover, if at all, on the ground of libel, that if the alleged libelous notice had been confined to an exact statement of plaintiff's indebtedness, which the jury believed to be true, the verdict should have been in favor of the defendant, the communication being in the judgment of the court not privileged. On the question of privilege the court said:

"Several rulings were asked on the question of privilege. As we have seen, the case is to be considered solely on the footing of libel. From this point of view it is perfectly apparent that the judge could not have ruled that the communication was privileged as matter of law. The jury might well have found facts that would cut at the roots of such a ruling. They might have found not only that the proposition, that the plaintiff was a man who refused or neglected to pay his honest debts, was false, as they have found, but also that it was known by the defendant to be false. They might have found that it was volunteered from malevolent motives. They might have found that the whole organization was a mere scheme to oust the courts of their jurisdiction and to enforce colorable claims of the members by a boycott intended to take the place of legal process, and that there was no pretense of any duty about the matter. Indeed, it is hard to see how the by-laws, or any understanding of the defendant about the by-laws, could have afforded him a justification, as the by-laws merely expressed the terms on which he saw fit to enter into a voluntary organization. A

man cannot justify a libel by proving that he contracted to libel. More specifically, a false statement of a kind manifestly hurtful to a man in his credit and business and intended to be so, is not privileged because made in obedience to the requirements of a voluntary association got up for the purpose of compelling by a boycott the satisfaction of its members' claims by the exclusion of a resort to the courts."

"We do not assume that the character of this organization was what we have described. We only say that the jury might have found it to be such, and the requests for rulings do not exclude that possible view of the facts. Of course, we do not mean to say that the statement might not have been privileged, if believed to be true, and if the purpose of the Association and publication was, and was understood to be merely to give information to all parties concerning the credit of people with whom they might deal, but none of the requests were limited to such a state of facts. The difficulty in supposing it is that the by-laws expressly require the members to have no dealings with any person whose name is on the list."

A point was made by the defendant that as the publication of the "black-list" was made by the Association he was not responsible for its action; but the court refused to sustain this view and held, on the contrary, that the defendant having, by his notice of indebtedness sent to the Association, pursuant to an understood plan, set in motion its machinery of boycott and black-list as against the plaintiff, was responsible for the consequences to the latter.

The case may therefore be regarded as authority for the propositions:

First. The publication by means of a "black-list," such as described above, of the name of a trader as a delinquent debtor, is libelous *per se* and actionable without proof of special damage if the allegation of indebtedness be false in fact.

Second. Such publication does not become privileged by reason of the fact that it is made in accordance with the rules of an association designed for the purpose of enforcing the payment of debts due members through boycotting or refusing supplies to their alleged delinquent debtors.

Third. The individual member of an association organized for the collection of debts, in the manner described, is responsible in damages to any trader, whose name, by a false statement that the latter is indebted to him, he causes to be placed on the "black-list" of the association.

Having regard to the first two propositions as stated, the case may, on hasty consideration, appear to have departed from earlier authorities on the law of libel; since it has generally been held that to falsely allege of a trader that he is indebted, without imputing insolvency, is not libelous *per se*, and that one trader may directly, or through an association of which both are members, impart information concerning the credit of a third, without incurring liability by reason of the falsity of such information, if it were given in good faith, with an honest belief in its truth, and for the purpose of enabling the person receiving it to determine whether or not credit could be safely extended to the third party. It is submitted, however, that the decision, instead of advancing new theories on the law of libel, is in thorough accord with principles already well established. The court undoubtedly treated the "black-list" libelous *per se*, not simply because it contained a false allegation of indebtedness, but, for the further reason, that the extrinsic circumstances surrounding the publication necessarily tended to make it injurious to the trade or calling of the person named as the delinquent debtor.

It has always been held actionable without proof of special damage to falsely impute insolvency to a trader, because the ability to obtain credit and carry on trade is thereby presumptively impaired; and when the same effect is necessarily produced by the publication in a particular way of a false allegation, that a trader owes a debt, it is only logical that the law should attach the same consequence to such a publication, as if the fact of insolvency were falsely alleged. It is indeed difficult to conceive a plan better calculated to inflict injury and damage on a trader than to circulate among dealers, upon whom he is dependent for supplies, a statement, the effect of which is to prevent their selling to him upon any terms; and if such statement is false it should, upon well-established principles, be regarded as an actionable libel

without proof of special damage. It is not unfair to the person giving the false information to presume that the damage intended by him and his association was in fact suffered.

The second proposition stated above upon the authority of the case under discussion is equally sound, and in harmony with the principles, to which the courts have always relied, in determining whether or not a communication, otherwise libelous, was justifiable and excusable on the plea of privilege.

Ogders on "Libel and Slander," page 238, states the rule to be that where the defendant has an interest in the subject matter of the communication, and the person to whom the communication is made has a corresponding interest, in such case every communication honestly made in order to protect such common interest is privileged by reason of the occasion. He further says: "Such common interest is generally a pecuniary one; as that of two customers of the same bank, two directors of the same company, two creditors of the same debtor." And again: "To be within the privilege the statement must be such as the occasion warrants, and must be made *bona fide* to protect the private interests both of the speaker and the person addressed."

Chief Justice Holmes, of the Massachusetts court, recognized these principles when, in the opinion already quoted, he said:

"Of course we do not mean to say the statement might not have been privileged, if believed to be true, and if the purpose of the Association and publication was, and was understood to be merely to give information to members concerning the credit of people with whom they might deal."

In such a case the legitimate object of the communication being to protect the interest of the person or persons to whom addressed, would bring it within the exception to the general rule, and make it privileged. As pointed out by the court, however, protection to the members of the Association, to whom the black-list notice was sent, was not the object sought to be accomplished thereby, for the reason that, after receiving it, not only were they bound to refuse credit to the alleged debtor, but according to the rules of the

Association must decline to trade with him on any terms. The object of the communication was to enforce, by the coercive process of boycott, the collection of a debt due one member of the Association, and was therefore in his interest alone, and not made in a common interest, which would give it a privileged character. It is no answer to say that a common interest arose by reason of membership in an association, whose by-laws required the notice to be sent, for to quote again from the language of the court: "A man cannot justify libel by proving that he contracted to libel."

The Pennsylvania case of *McIntyre v. Weinert* (*supra*) also sustains the proposition that a false notice of indebtedness sent by one member to other members of an association, in accordance with its by-laws, for the purpose of causing them to boycott or refuse supplies to the alleged debtor until he pays the claim, is libelous without proof of special damage; but the court in that case was not under the pleadings called upon to decide whether such a notice could be regarded as a privileged communication, by reason of the fact that it was confined to members of an association organized for mutual benefits and protection. The issue was raised by a demurrer to the declaration or plaintiff's statement of claim, which alleged not only that the allegation of indebtedness was false but maliciously made, and the court held that the facts of the statement, being admitted by the demurrer, the plea of privilege could not be raised, since the malice in making the communication complained of would destroy any privileged character which it might otherwise have possessed. The facts of this case, which may be of interest, are briefly as follows:

The plaintiff brought suit for injury to his business, that of a retail produce dealer, by the act of defendant, a wholesale produce dealer, in falsely notifying the members of an association of wholesale produce dealers known as the "Philadelphia Produce Credit and Collection Bureau," that plaintiff was indebted to him in a certain sum, which plaintiff had refused to pay. In consequence of this notice plaintiff's name was placed on a debtor's list or "black-list" of the Association, and all its members thereafter, in accordance with its rules, as defendant intended they should, refused to sup-

ply plaintiff with supplies either on credit or for cash. It was alleged in the statement of claim that the Association was composed of all of the most prominent wholesale dealers in Philadelphia, and that plaintiff was almost entirely dependent upon them for his supplies.

It will be noted in this case that the communication complained of simply alleged that the plaintiff was indebted to defendant in a certain sum, differing in this respect from the Massachusetts case, wherein the "black-list" notice was to the effect that the plaintiff in the latter case did not "pay his honest debts."

The Supreme Court of Pennsylvania, however, held the false notice of indebtedness, considered in connection with the extrinsic circumstances alleged in the statement, libelous *per se* and actionable without proof of special damage. The court, through Justice Mestrezat, said:

"In support of his demurrer, it is claimed by the defendant that the writing is not libelous. Standing alone, possibly that may be true. But in considering this writing we must consider not only the writing itself, but the inducement laid in the statement. 'It is the office of the inducement to narrate the extrinsic circumstances, which, coupled with the language published, affects its construction, and renders it actionable; where standing alone and not thus explained, the language would appear not to affect him injuriously.' (Townsend on 'Slander and Libel,' Sec. 308.) The publication complained of, considered in the light of the extrinsic matters averred in the statement, clearly tends to injure the plaintiff in his business as a retail produce dealer, and is therefore actionable."

If in addition to being libelous *per se*, the "black-list" notice cannot be regarded as a privileged communication, as held by the Massachusetts court, then it is clear that the members of a debt-collecting association, based upon the plan already described, must assume full responsibility for the truth of any allegation of indebtedness, circulated in this manner among them in accordance with its rules; and even though the allegation be made in good faith, and with an honest belief in its truth, and yet should be judiciously determined false in fact in an action brought against them, or

any of them, by the alleged debtor, the latter would be entitled to a verdict. The importance of this proposition is plain when it is considered that actions for black-listing alleged debtors will most frequently arise in cases where there exists some dispute over the claim alleged to be due and the debtor regards himself in a position to deny the indebtedness.

As we have seen, the court did not in either of the two cases discussed consider whether, eliminating the element of libel, the action could be sustained on other grounds. In these debt-collecting associations the "black-list" is simply the method employed to institute the boycott, which is the principal and direct source of injury to the delinquent debtor, and the question therefore arises, Can he secure redress for this injury even though the debt, to enforce the collection of which it is inflicted, is actually due as alleged in the black-list notice?

This question may be considered in a twofold aspect; first, whether the person injured by the boycott has a right of action against the member for whose benefit and at whose instance it is instituted, and, secondly, whether the Association, through which the boycott is enforced, incurs liability for the damage inflicted.

When a creditor institutes a boycott against his debtor through means of an association, such as above described, for the purpose of enforcing payment of the debt, he simply puts into operation a pre-existing agreement between himself and the other members of the association, that they will not deal with any person indebted to one of them until the debt is paid. If therefore this agreement in its operation constitutes an invasion of any legal rights of the debtor, the creditor is employing unlawful methods to collect debts due him, and, if loss is inflicted thereby, he becomes responsible. If, on the other hand, the agreement is in all respects legitimate, the damage resulting from acts done in pursuance of it is not the subject of an action, and would fall under the designation *damnum absque injuria*.

It must be admitted that one person may refuse to sell to another on any pretext whatever, and cannot be held to account for his conduct. Is it equally within his right to per-

suade or induce another to exercise the same privilege and refuse to trade with a third person for the purpose of injuring the latter?

The authorities bearing on this question are by no means harmonious. In England the earlier cases sustain the proposition that an act, otherwise lawful, might become unlawful by reason of the motive with which it was done. Thus in *Keeble v. Hickeringill*, cited and followed in *Carrington v. Taylor*,⁴ it was held actionable for the plaintiff to fire off his gun on his own premises, with the malicious intent of frightening wild ducks from a decoy owned by his neighbor.

The same principle was recognized in the case of *Flood v. Jackson* (1895)⁵ and *Bowen v. Hall*,⁶ but the more recent case of *Allen v. Flood*⁷ reversed *Flood v. Jackson*, and may be regarded as departing from the earlier doctrine as stated in *Bowen v. Hall*. The syllabus in the case of *Allen v. Flood* reads as follows:

"An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action.

"Discussion of the cases in which evil motive is said to be an essential ingredient in a civil cause of action, such as malicious persecution. See per Lord Watson, Lord Herschell, and Lord Davey, at pages 92, 93, 125, 126, 173.

"The respondents were shipwrights employed 'for the job' on the repairs to the woodwork of a ship, but were liable to be discharged at any time. Some ironworkers who were employed on the ironwork of the ship objected to the respondents being employed, on the ground that the respondents had previously worked at ironwork on a ship for another firm, the practice of shipwrights working on iron being resisted by the trade union of which the ironworkers were members. The appellant, who was a delegate of the union, was sent for by the ironworkers and informed that they intended to leave off working. The appellant informed the employers that unless the respondents were discharged all

⁴ 11 East, 573.

⁵ L. R. (1895), 2 Q. B. 21.

⁶ L. R., 6 Q. B. D. 333.

⁷ L. R., Appeal Cases (1898), 1.

the ironworkers would be called out or 'knock off' work (it was doubtful which expression was used); that the employers had no option; that the iron men were doing their best to put an end to the practice of shipwrights doing iron-work, and that wherever the respondents were employed the iron men would cease work. There was evidence that this was done to punish the respondents for what they had done in the past. The employers, in fear of this threat being carried out, which (as they knew) would have stopped their business, discharged the respondents and refused to employ them again. In the ordinary course the respondents' employment would have continued. The respondents having brought an action against the appellant, the jury found that he had maliciously induced the employers to discharge the respondents and not to engage them, and gave the respondents a verdict for damages.

"Held, reversing the decision of the Court of Appeal (1895), 2 Q. B. 21 (Lord Halsbury, L. C., and Lords Ashbourne and Morris dissenting), that the appellant had violated no legal right of the respondents, done no unlawful act, and used no unlawful means in procuring the respondents' dismissal; that his conduct was therefore not actionable, however malicious or bad his motive might be, and that, notwithstanding the verdict, the appellant was entitled to judgment.

"*Carrington v. Taylor* (1809), 11 East. 571, overruled, and *Keeble vs. Hickeringill* (1706), 11 East. 574 n.; *Lumley v. Gye* (1853), 2 E. & B. 216; *Bowen v. Hall* (1881), 6 Q. B. D. 333; and *Temperton v. Russell* (1893), 1 Q. B. 715, commented on."

Lord Morris, in dissenting from the judgment pronounced in the case, said that in his view it overturned "the overwhelming judicial opinion of England."

The majority of the judges in their several opinions drew a distinction between the procurement of the breach of an enforceable contract, and the mere persuasion of another not to enter into a contract with a third person, holding, to use the language of Lord Herschell, "that in one case the act procured was the violation of a legal right, for which the person doing the act, which injured the plaintiff, could

be sued as well as the person who procured it, whilst, in the other case, no legal right was violated by the person who did the act from which the plaintiff suffered."

Lord Chancellor Halsbury, in an able dissenting opinion, vigorously combated this view, and argued that the legal right of a man to be allowed free to contract for his labor was recognized and protected by the law. To quote from his opinion:

"The first objection made to the plaintiffs' right to recover for the loss which they thus undoubtedly suffered is that no right of the plaintiffs was infringed, and that the right contended for on their behalf is not a right recognized by law, or at all events, only such a right as everyone else is entitled to deprive them of, if they stop short of physical violence or obstruction. I think the right to employ their labor as they will is a right both recognized by the law and sufficiently guarded by its provisions to make any undue interference with that right an actionable wrong.

"Very early authorities in the law have recognized the right; and, in my view, no authority can be found which questions or qualifies it. The schoolmaster who complained that his scholars were being assaulted and brought an action, the quarry owner who complained that his servants were being menaced and molested, were both held to have a right of action. And it appears to me that the importance of those cases, and the principle established by them, have not been sufficiently considered. It is said that threats of violence or actual violence were unlawful means; the lawfulness of the means I will discuss hereafter. But the point on which these cases are important is the existence of the right. It was not the schoolmaster who was assaulted; it was not the quarry owner who was assaulted or threatened; but, nevertheless, the schoolmaster was held entitled to bring an action in respect of the loss of scholars attending his school, and the quarry owner in respect of the loss of workmen to his quarry. They were third persons; no violence or threats were applied to them, and the cause of action, which they had a right to insist on, was the indirect effect upon themselves of violence and threats applied to others.

"My Lords, in my view these are binding authorities to

show that the preliminary question, namely, whether there was any right of the plaintiffs to pursue their calling unmolested, must be answered in the affirmative. The question of what is the right invaded would seem to be reasonably answered, and the universality of the right to all Her Majesty's subjects seems to me to be no argument against its existence. It is, indeed, part of that freedom from restraint, that liberty of action, which, in my view, may be found running through the principles of our law."

Having thus determined that the plaintiffs had certain rights not arising from contract, in which the law would protect them, Lord Halsbury relied upon the earlier decisions already quoted for holding that if these rights were infringed by defendant, by acts malicious in law, the plaintiffs were entitled to recover. He cited with approval the rule laid down by Lord Justice Bowen in *Mogul Steamship Company v. McGregor*,⁸ in deciding whether, when intent to harm and actual harm has been proved, malice is present, in the following language:

"In cases like this, when the element of intimidation, molestation or the other kinds of illegality to which I have alluded are not present, the question must be decided by the application of the test I have indicated. Assume that what is done is intentional, and that it is calculated to do harm to others, then comes the question 'was it done with or without just cause or excuse.' If it was *bona fide* in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish and unreasonable. But such legal justification could not exist where the act was done merely with the intention of causing temporal harm without reference to one's own lawful gain or the lawful enjoyment of one's own rights."

I have referred at some length to the dissenting opinion of Lord Halsbury because it appears to be more nearly in accord with the decisions in this country than the judgment of the court. Indeed Lord Halsbury himself observed that the case of *Keeble v. Hickeringill* (*supra*), which was in effect

⁸ L. R., 21 Q. B. D. 544.

overruled by the judgment in *Allen v. Flood*, had been generally recognized and acted upon in the American courts, and cited as instances the cases of *Walker v. Cronin*⁹ and *Angle v. Chicago, Etc., Ry. Co.*¹⁰ In these cases the principle was recognized that malice in the procurement of an act could be the basis of an action of tort, although the act in itself could not be regarded as actionable.

Justice Brewer, of the Supreme Court of the United States, in the case of *Angle v. St. Paul Ry. (supra)*, cited with approval the case of *Rice v. Manley*,¹¹ wherein the plaintiff had made an agreement with one Stebbins to purchase from him a quantity of cheese, to be delivered at a future day. The contract was not binding by reason of the statute of frauds. The defendant knowing of this, by means of a fictitious telegram, persuaded Stebbins that the plaintiff did not want the cheese and would not take it, and thus himself secured a purchase of it. The plaintiff having brought his action for his failure due to the connivance of the defendant to obtain the cheese from Stebbins, the defendant set up the plea that he had not procured the breach of any contract which could be enforced against Stebbins for the sale and delivery of the cheese; but the court overruled the objection, saying: "Plaintiff's actual damage is certainly as great as it would have been if Stebbins had been obliged to perform his contract of sale, and greater for the reason that they cannot indemnify themselves for their loss by a suit against Stebbins to recover damages for a breach of contract."

Among other cases in this country wherein the principle of the earlier English decisions was followed are *Lucke v. Clothing Cutters' Assembly, K. of L.*,¹² wherein it was held actionable to procure the discharge of "non-union" employes by threatening to require "union" employes to quit work; *Jackson v. Stanfield*,¹³ wherein the plaintiff was made the victim of a boycott by retail lumber dealers, and the case

⁹ 107 Mass. 555.

¹⁰ 151 U. S. 1 (1893).

¹¹ 66 N. Y. 82.

¹² 77 Md. 396 (1893).

¹³ 36 N. E. 345 (Ind.).

of *Moore & Co. v. Bricklayers' Union Trade et al.*¹⁴ In the last-mentioned case the subject was discussed at considerable length by Judge Taft, of the Ohio court. The action was based on a boycott circular issued against the plaintiff with the object of inducing bricklayers not to work on buildings for which plaintiff furnished any materials. It was held that this boycott was unlawful as being in the sense of the law malicious, and apart from the element of conspiracy, would constitute a ground of action. Judge Taft, after discussing the authorities, cited *Bowen v. Hall* (*supra*), saying:

"It follows from this case that generally where one induces another to do a legal injury to a third with the intent to benefit himself or to injure such third person, the act of inducement is without cause and malicious. It must also be conceded from the authorities cited that if the material men from whom Parker Bros. purchased the necessities of trade, for no reason at all but to injure Parker Bros., combined and refused to sell them anything and drove them out of business, Parker Bros. would have had a cause of action against such material men."

While there are a few authorities opposed to those just quoted, as for example the case of *Bohn Mfg. Co. v. Hollis*, Minnesota Supreme Court (1893), cited at the beginning of this article, yet these are sufficient to show that the weight of judicial opinion in this country is in favor of the views expressed by the dissenting opinion of Lord Halsbury in *'Allen v. Flood*. Wherever these views obtain, it would in all probability be held that a man, who persuades another not to trade with a third person, for the purpose thereby of coercing the third person into paying him a debt alleged to be due him, becomes liable to such third person in an action of tort on the ground of malice in the procurement of the act which caused the injury. As we have seen in the case of *Bowen v. Hall* (*supra*), an act causing injury is in the sense of the law malicious when it is without justification or excuse, and it will hardly be contended that a creditor is justified in inflicting the injury, which must result from a boy-

¹⁴ 7 Ry. Inc. L. J. 108 (1890).

cott, because of the existence of a debt due from the person thus injured. The creditor has the ordinary means of enforcing the collection of a claim through resort to the courts, and any injury which the debtor may suffer through this lawful method cannot be the ground of complaint. Where the creditor, however, pursues the extraordinary plan of boycott for the collection of his claim, he is, according to the principles stated by Lord Halsbury in the case of *Allen v. Flood*, inflicting a legal injury by interfering with the debtor's rights to make contracts necessary to the prosecution of his trade or business, and the procurement of the boycott being for the purpose of inflicting this legal injury, is a malicious act; because without legal justification, and is therefore actionable.

On the other hand, where the principle established by the court in *Allen v. Flood* prevails, namely, that malice in the procurement of an act, which is lawful in itself, will not constitute a ground of action as against the person procuring it to be done, however great the injury inflicted, it would necessarily be held that as a merchant may legally refuse to deal with another on any ground whatever, the act of persuading him to exercise this privilege, however malicious, is not actionable.

Having reference to the modern conditions of trade, there would seem little justification for drawing a distinction, on the ground of lawfulness or unlawfulness, between an act which brought about the breach of an existing contract to the detriment of one of the parties thereto, and an act which deprives a man of the opportunity of making contracts necessary to the conduct of his trade and business.

A trader such as the plaintiff in the Pennsylvania case of *McIntyre v. Weinert* (*supra*), being a retail produce dealer, would find it absolutely necessary to the conduct of his business that he should be able from day to day to make contracts for supplies; and if his doing so is unjustifiably interfered with, the injury sustained is certainly as great as if he were deprived of the benefit of contracts actually made. Indeed, the injury as pointed out in the New York case of *Rice v. Manley* (*supra*) is greater, because for the breach of a contract he would have a right of action as against the

other party thereto. That there is a legal right involved in the freedom to enter into contracts of buying and selling is, it is submitted, beyond question, and an injury, consisting of the deprivation of this right, should logically be regarded as the subject of legal redress.

In addition to the grounds of libel and malice, which have been already discussed, the plaintiff in the Pennsylvania case of *McIntyre v. Weinert* (*supra*), stated as an additional ground of his action the fact that defendant had inflicted the injury complained of through means of an unlawful combination. In the case of *Allen v. Flood*, Lord Watson, in his opinion sustaining the judgment of the court, expressly recognized that conspiracy affords in certain cases a special ground for action to recover damages. In discussing the case of *Temperton v. Russell*,¹⁵ he used the following language:

"I do not think it necessary to notice at length *Temperton v. Russell*, in which substantially the same reasons were assigned by the Master of the Rolls and Lopes, L. J., as in the present case. It is to my mind very doubtful whether in that case there was any question before the court with regard to the effect of the *animus* of the actor in making that unlawful which would otherwise have been lawful. The only findings of the jury which the court had to consider were: (1) That the defendants had maliciously induced certain persons to break their contracts with the plaintiffs, and (2) that the defendants had maliciously conspired to induce, and had thereby induced, certain persons not to make contracts with the plaintiffs. There having been undisputed breaches of contract by the persons found to have been induced, the first of these findings raised the same question which had been disposed of in *Lumley v. Gye*. According to the second finding, the persons induced merely refused to make contracts, which was not a legal wrong on their part; but the defendants who induced were found to have accomplished their object, to the injury of the plaintiffs, by means of unlawful conspiracy—a clear ground of liability according to *Lumley v. Gye*, if, as the court held, there was evidence to prove it."

¹⁵ L. R. (1893), 1 Q. B. D. 715.

Lord Davey also in his opinion in support of the judgment called attention to the fact that the case was not one of conspiracy, thereby indicating that, if it were, the views of the court as to the liability of the defendant might have been different. That case can therefore not be cited as authority for the proposition, as held in some quarters, that nothing which is not actionable when done by one person can be actionable or unlawful when done by a combination of persons.

In the very early case of *Gregory v. Brunswick*,¹⁶ the Duke of Brunswick and others as defendants were held liable in an action of damages on the ground of conspiracy for combining to hiss the plaintiff, who was an actor, and actually carrying out this purpose, though it was expressly admitted by the court that it was perfectly lawful for anyone, without preconcert, to express his disapproval of an actor in this manner.

In Pennsylvania, conspiracy has always been regarded as furnishing a special ground for an action of tort. Thus in the case of *Wildee v. McKee*¹⁷, Justice Sterrett said :

"It cannot be doubted that trespass on the case for conspiracy to defame and thereby injure another in his particular avocation or business may be maintained whenever, in pursuance of such unlawful combination, means have been employed which tended to effectuate and, to a greater or less extent, accomplish the object of the conspirators: *Mott v. Danforth*, 6 Watts, 304-6; *Haldeman v. Martin*, 10 Barr. 369; *Hood v. Palm*, 8 Id. 237-9. In the last case it is said : 'A conspiracy to defame by spoken words, not actionable, would be a subject of prosecution by indictment; and if so, then equally so a subject of prosecution by action, by reason of the presumption that injury and damage would be produced by the combination of numbers. Defamation by the outcry of numbers is as resistless as defamation by the written act of an individual. The mode of publication is different; and it is for this reason that an action lies, at the suit of one who has been the subject of a conspiracy, whenever an indictment

¹⁶ 6 Man. and G. 205.

¹⁷ 111 Pa. 335.

would lie for it.' As an illustration of the principle, it is said an indictment lies for a conspiracy to vex or annoy another, for instance, to hiss a play or an actor, right or wrong; and hence, if the subject of such a conspiracy has been damaged thereby, a civil action may be maintained."

In *Cote v. Murphy*,¹⁸ in discussing the right of action of the plaintiff for the refusal on the part of certain dealers to furnish him materials, the court, through Justice Dean, said:

"We assume, so far as concerns defendants, if their agreement was unlawful, or if lawful it is carried out by unlawful acts to the damage of plaintiff, the judgment should stand. The authorities of this state go to show that while the act of an individual may not be unlawful, yet the same act when committed by a combination of two or more may be unlawful and thereby be actionable."

The exact opposite of this doctrine was stated by Justice Mitchell in the case of *Bohn Mfg. Co. v. Hollis* (*supra*), who said:

"What one man may lawfully do singly two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be lawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act."

Of course, there are certain conspiracies, such as combinations in restraint of trade, which are not enforceable as between the parties themselves, and which may be the subject of indictment because of the injury to the public, but which do not form the ground of an action at the instance of an individual. The authorities, however, would seem to make a distinction between conspiracies, which affect an individual simply as one member of a community generally affected by it, and a conspiracy which is directed in a given case toward a particular individual with the design of inflicting injury upon him in his person, reputation or business. In the case

¹⁸ 159 Pa. 420.

of a number of merchants, for example, who by combination advance the price of an article of food, they may be subjected to an indictment, but would not be amenable to a civil action at the hands of some person who was obliged by reason of the combination to pay more for the particular article of food affected by it; but it is submitted the case would be different if these merchants entered into an agreement not to sell, except at an extortionate price or not to sell at all, their products to a certain individual to his detriment. In such a case if the combination is in the sense of the law unlawful, it is quite clear that the particular individual injured should be able to obtain redress by an action of conspiracy against any one or all of the members of the combination.

What constitutes an unlawful combination, which will give a right to civil action to persons injured by it, was discussed by Justice Dean in the case cited. He says:

"A dictum of Lord Denman in *R. v. Seward*, 1 A. & E. 711, gives this definition of a conspiracy: 'It is either a combination to procure an unlawful object or to procure a lawful object by unlawful means.' This leaves still undetermined the meaning to be given the words lawful and unlawful in their connection in the antithesis. An agreement may be unlawful in the sense that the law will not aid in its enforcement, or recognize it as binding upon those who have made it, yet not unlawful in the sense that it will punish those who are parties to it, either criminally or by a verdict in damages. Lord Denman is reported to have said afterwards in *R. v. Heck*, 9 A. & E. 690, that his definition was not very correct. See note to sec. 2291, Wharton's Criminal Law.

"It is conceded, however, in the case in hand, any one of defendants, acting for himself, had a right to refuse to sell to those favoring the eight hour a day, and so, acting for himself, had the right to dissuade others from selling. If the act were unlawful at all, it was because of the combination of a number. Gibson, J., in *Com. v. Carlisle*, Brightly's R. 39, says: 'Where the act is lawful for the individual, it can be the subject of conspiracy when done in concert, only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the

prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence.' "

Upon the principles here set out is not an agreement among a number to refuse to sell supplies to a debtor of one of them the object of coercing him into paying the debt a conspiracy, which gives the debtor a right of action if he suffers damages from it? Such an agreement unquestionably establishes an artificial restraint upon the freedom of trade, and is a direct infringement upon the rights of a trader to obtain his supplies from such persons as would ordinarily, if not restrained, be willing to sell to him. No merchant would, under ordinary conditions, refuse to sell to another if paid in cash the full price demanded for the article sought to be purchased; and when he refuses to do this in a given case by reason of being party to an agreement, it is perfectly apparent that an artificial barrier to trade has been set up between him and the person offering to purchase, to the detriment of the latter.

Debt-collecting agreements of the kind under discussion, whether evidenced by the by-laws of an association or otherwise, usually make it obligatory upon the creditor in the first instance to notify the other members that the debt has not been paid and then make it incumbent upon all the members to refuse to sell to the delinquent debtor. Thus the latter, though he be an honest debtor, unable to pay, but willing to do so, if given time, is deprived of any opportunity to seek indulgence at the hands of his creditor, and also of the means of continuing in business and securing thereby the means to discharge the debt. Thus not only does such an agreement deprive the debtor affected by it of his right to freely enter into contracts, as he would be able to do, under normal conditions, but totally interferes with the relations which would ordinarily exist between debtor and creditor.

Again, the agreement has a necessary tendency, when set in operation against a debtor who disputes the claim, to deprive him of his legal right to have the claim adjudicated in the courts by due process of law. If the members of the combination have been able to establish a monopoly in the

supplies which the debtor may need, it is perfectly apparent that he may find it rather to his advantage to pay even an unjust claim than to be deprived of the means of continuing his business. The Massachusetts case of *Weston v. Barnicoat* (*supra*) called attention to this phase of illegality, when it suggested that the organization in that case might have been found to be a "mere scheme to oust the courts of their jurisdiction and to enforce colorable claims of the members by a boycott, intended to take the place of legal process."

A combination fraught with such consequences to persons injuriously affected by it is necessarily vexatious, harmful and bad on grounds of public policy, and should therefore be regarded as a conspiracy, which would constitute the basis of an action of damages brought against any or all of the members by a debtor whom it has injuriously affected in his trade and business.

This conclusion is strongly sustained by the case of *Hartnett v. Plumbers' Supply Ass'n*,¹⁹ wherein proceedings in the nature of *quo warranto* were instituted to forfeit the charter of an Association organized for the purpose of "promoting pleasant relations amongst its members, discussing, arbitrating and settling all matters pertaining to the prosperity and promotion of the jobbing plumbers' supply business, and establishing and maintaining a place for social meetings," on the ground that the Association was exceeding its charter privileges by collecting the debts due members upon the boycott plan. The court decreed a franchise of the charter. In the course of his opinion Justice Barker said:

"In short, these proceedings against the alleged debtors of its members, instituted by the corporation under the pretended sanction of its corporate franchises, are a method of supplanting the courts by the private machinery of the corporation, of compelling such persons to pay what its members demand by means of threatening to expose to certain dealers their alleged delinquencies by actually informing such dealers that the persons owe overdue accounts, and by preventing such persons from obtaining credit from a num-

¹⁹ 169 Mass. 229 (1891).

ber of dealers in goods needed in the business which such persons are carrying on.

"This private corporation assumes, in the exercise of what it claims to be the corporate privileges conferred by its charter, to require other persons to submit their controversies to arbitration, dictates the terms upon which trade shall be carried on by other persons, and requires other persons, under penalties, practically severe, to submit to it their reasons for their conduct in matters with which it has no concern."

In deciding that petitioner, who was a debtor affected by the boycott, had suffered legal injury, which under the *quo warranto* statutes of Massachusetts entitled him to institute the proceedings, the court said :

"The credit of a tradesman is an important and often his most considerable resource, and he has a right to rely upon and to use it in endeavoring to do business. No one has the right to attempt to destroy or to injure his credit unless the person so attempting can show that his own legitimate interests require such action. Assuming that the legitimate interests of sellers of plumbers' supplies may justify such persons in informing each other that a customer of one of them has not paid for purchases, and in agreeing with each other to sell him no goods except for cash paid before delivery, the respondent has no justification for its interference with the petitioner's business. The respondent is a legal person other than and distinct from its members. It is not a seller of plumbers' supplies, and has no interest in that market and no legitimate concern with the question of who shall purchase in that market upon credit. When without being engaged in the trade or in any relation by which its legitimate interests are affected by the question whether the petitioner shall have credit in that market, the respondent assumes to notify sellers of such goods that the petitioner has not paid his accounts, and to debar a considerable number of dealers from selling to him upon credit, his right to an open market and to proffer his credit without officious interference from persons who have no legitimate interest in the question whether he shall buy upon credit, is injured and put in hazard."

This opinion has been quoted at length because it bears upon the second branch of the question proposed, namely: whether a debtor injured by a boycott has any right of redress as against the Association through which it was instituted. In this case it was held that refusal to extend credit at the instance of the Association was a legal wrong, for which the wronged person was entitled to redress, because the Association had no legitimate interest to serve in the matter.

If this case should be followed it is quite clear that charters of the various trade associations organized for the purpose of collecting debts of members upon the plan indicated should be forfeited, for in all instances it will probably be found that their charters do not expressly authorize the carrying out of such a purpose any more than did the charter considered in the Massachusetts case.

In view of the many objections to the boycott plan of collecting debts, it will in all likelihood never be approved as legitimate by the courts. The origin of the term boycott itself is surrounded by circumstances of illegality and oppression, as will appear from the language of Mr. Justin McCarthy's work, "England Under Gladstone," which may appropriately conclude this article:

"The strike was supported by a form of action, or rather inaction, which soon became historical. Captain Boycott was an Englishman, an agent of Lord Earne, and a farmer of Lough Mask, in the wild and beautiful district of Conne-mara. In his capacity as agent he had served notices upon Lord Earne's tenants, and the tenants suddenly retaliated in the most unexpected way by, in the language of schools and society, sending Captain Boycott to Coventry in a very thorough manner. The population of the region for miles around resolved not to have anything to do with him, and, as far as they could prevent it, not to allow any one else to have anything to do with him. His life appeared to be in danger; he had to claim police protection. His servants fled from him as servants flee from their masters in some plague-stricken Italian city. The awful sentence of excommunication could hardly have rendered him more helplessly alone for a time; no one would work for him; no one would supply

him with food. He and his wife had to work in their own fields themselves, in most unpleasant imitation of the Theocritian shepherds and shepherdesses, and play out their grim eclogue in their deserted fields, with the shadows of armed constabulary ever at their heels. The Orangemen of the north heard of Captain Boycott and his sufferings, and the way in which he was holding his ground, and they organized assistance and sent him down armed laborers from Ulster. To prevent civil war, the authorities had to send a force of soldiers and police to Lough Mask, and Captain Boycott's harvests were brought in, and his potatoes dug, by the armed Ulster laborers, guarded always by the little army."

Francis B. Bracken.

INSURANCE IN ITS RELATION TO THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

Article 1, Section 8, of the Constitution of the United States provides that "the Congress shall have power . . . to regulate commerce with foreign Nations and among the several States, and with the Indian Tribes." The object of this paper is to consider what relation, if any, insurance, as carried on by corporations of one state with the people of other states, bears to "commerce among the several states." As the solution of this question depends, first, upon the meaning of the words "commerce among the several states," and second, upon the nature of insurance, the subject will be discussed under these heads.

I. THE COMMERCE CLAUSE.

It is an interesting fact that at the beginning of the present century—several years after the adoption of the Constitution—there was nothing deserving of the title "commerce among the several states." The various scattered colonial communities received from abroad whatever necessities were not produced in their immediate vicinities. Travel from one colony to another was burdensome and infrequent. We read that when the national government was removed from Philadelphia to Washington its goods were sent down the river in a frail bark, and the President and his wife, proceeding by land, were lost in the woods beyond Baltimore. The Alleghany mountains constituted an almost insurmountable barrier between what was then known as the East and the West. In spite of this, however, the jealousies which had already existed between the colonies, their selfishness towards each other, and the frequent discriminations by one colony against another, warned the framers of the Constitution that if there ever should be commerce among the several states it must be regulated by the national government.

In the consideration by the Supreme Court of this part of the commerce clause, *it has never been even suggested that the words bear less than their usual signification.* That court has, however, in certain cases, given them a larger meaning than ordinarily attaches to them. In order to intelligently apply these decisions of the Supreme Court to our subject, it is desirable to first briefly consider the usual or common signification of the words "commerce among the several states."

"Commerce" is defined to be "interchange of goods, merchandise or property of any kind." It is trade or traffic and includes the instrumentalities of trade or traffic.

"Among," if standing alone, might be broad enough to be construed within or throughout. In the connection, however, in which it is used, this construction is impossible and must be limited. "Among the several states" evidently means between the several states.

The word "states" seems perhaps more indefinite than either the words "commerce" or "among." Woolsey in his "Introduction to International Law," Section 36, defines a state to be "a community of persons living within certain limits of territory, under a permanent organization, which aims to secure the prevalence of justice by self-imposed law." The uncertainty attaching to the word "states" arises from the fact that it is sometimes popularly used to indicate certain portions of land contained within given geographical limits. This conception of the word is as narrow as it is inaccurate. The state is, in reality, the whole people of one body politic. When we further consider that the body politic is not organized for the purpose of engaging in commercial transactions, but that such transactions occur between the individuals who constitute the body politic, we may conclude that commerce between the several states means commerce between an individual or individuals of one state and an individual or individuals of another state. In short, the obvious intent of the commerce clause is not to draw geographical lines as such, but to protect persons, viz., the persons of one state against the jealousies, selfishness and discriminations of other states.

The usual and common signification of the phrase "com-

merce among the several states" appears therefore to be an exchange of property between the people of one state and the people of another state or other states. As already remarked, it has never been held that the phrase should be limited within a narrower scope, but, on the contrary, its meaning has been somewhat enlarged by the Supreme Court.

Whenever this clause has been presented to it, the Supreme Court has been obliged to consider directly whether a particular statute is a regulation of commerce, which indirectly raises the question whether the subject-matter of the statute is commerce. General broad definitions of the word "commerce" are nothing more than *dicta* except in so far as the definition was necessary to the decision of the case in which it was given. As to these *dicta*, however, it should be noted that even in them there have been no suggestions that the words of the commerce clause bear less than their usual signification. Consequently, we approach the cases which decide secondarily what is meant by "commerce among the several states," but primarily what constitutes a regulation of that commerce, in order to ascertain to what extent, if any, the Supreme Court in determining the latter has added to the ordinary meaning of the former.

Before proceeding in this it is interesting to note the historical fact as set forth by Messrs. Prentice and Eagen in their exhaustive and useful work upon this clause, page 14, that for thirty-five years after the framing and adoption of the Constitution, no case involving the extent of this power arose in the Federal Supreme Court. "Before the year 1840," the text continues, "the construction of this clause had been involved in but five cases submitted to the Supreme Court of the United States. In 1860 the number of cases in that court involving its construction had increased to twenty; in 1870 the number was thirty; by 1880 the number had increased to seventy-seven; in 1890 it was one hundred and forty-eight; while at the present time" (1898) "it is not less than two hundred and thirteen. In the State Courts and United States Circuit and District Courts the progress is not less significant. In 1840 this clause of the Constitution had been involved in those courts in forty-eight cases only. In 1860 the number had increased to one hundred and sixty-

four; in 1870 it was two hundred and thirty-eight; in 1880 it was four hundred and ninety-four; in 1890 it was eight hundred, while at the present time" (1898) "it is nearly fourteen hundred." And the authors remark that "such a history as this can, it is believed, find its parallel in no other branch of constitutional law. To this field has been transferred in large part the modern battle of states' rights. . . . More significant than all, we find here in the majority of cases *the element of discrimination by one state against another*, showing that the old Hellenic appetite which found its satisfaction in the commercial chaos of the Confederation has been neither extinguished nor slaked." The purpose of the commerce clause being to prevent this discrimination, it will, wherever possible, be given a construction equal to the accomplishment of that purpose.

The cases which relate to the regulation of interstate commerce arise upon two lines of legislation,—state and national. In almost all cases the regulation out of which the complaint grows *has not been directly of commerce itself, but of one or more of the instrumentalities of commerce*. Commerce is the exchange of property, while its instrumentalities are the means by which that exchange is effected. Consequently, the Supreme Court has been called upon to consider, first, whether the commerce clause is broad enough to include the instrumentalities of commerce, and second, in each case, with few exceptions, whether or not the particular regulation before it is a regulation of an instrumentality. This distinction is an important one, and should not be lost sight of in a discussion of the matter before us, which directly raises the question as to what relation insurance bears to commerce itself, irrespective of its instrumentalities, as well as suggests, possibly, the further question, whether or not insurance is also an instrumentality of commerce. It is with the first question that we are at present concerned. In order, however, to understand the exact position which the Supreme Court has taken, it is necessary to consider a few of the leading cases that deal with the regulation of the instrumentalities of commerce before considering those which directly decide whether or not a particular transaction or line of transactions constitute commerce itself.

The discussion was opened by the leading case of *Gibbons v. Ogden*, 9 Wheat. 1. In his opinion delivered in that case, Mr. Chief Justice Marshall, than whom there has never been an abler expounder of the Constitution, defined in unmistakable terms the broad and liberal spirit in which the instrument is to be interpreted. Upon this subject he said: "This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? . . . If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government *those powers which the words of the grant, as usually understood, import*, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, *and render it unequal for the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent*; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded. As men whose intentions require no concealment generally apply the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, *must be understood to have employed words in their natural sense, and to have intended what they have said.* . . . *We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.* . . .

"The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or to the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects,

to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. . . . The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted *as if that term had been added to the word 'commerce.'*”

In the above quotation Mr. Chief Justice Marshall has indicated the error of limiting a general term, applicable to many objects, to one of its significations. The regulation of commerce is undoubtedly the regulation of traffic or trade or exchange directly. In the sense in which the phrase is used in the Constitution, however, it includes something more, viz., the regulation of the instrumentalities of traffic or trade or exchange. In short, the word “commerce,” with reference to its regulation, expresses the commercial intercourse between the parts of our nation, which may thus be regulated by prescribing rules for carrying on that intercourse as well as rules directly regulating what we have before referred to as commerce itself; but more often by the former, as in the statute passed upon in the case of *Gibbons v. Ogden*.

It was held in that case that certain laws of New York which granted to two men the exclusive right to navigate all the waters within the jurisdiction of that state, with boats moved by steam or fire for a term of years, amounted to a regulation of commerce. And while the language of Mr. Chief Justice Marshall might, at first glance, suggest that he intended to enlarge the common significance of the commerce clause, yet considered in relation to the question before the court, it merely amounts to an authoritative declaration that, as navigation is one of the necessary instrumentalities of commerce, the regulation of it is a regulation of commerce. Every complete commercial transaction consists of a number of dependent parts, and in so far as any of the latter are regulated, there is to that extent a regulation of commerce. If, for instance, transportation constitutes part of a commercial transaction, a regulation of the transporta-

tion is a partial regulation of commerce. Likewise of all other parts of the transaction.

The principle just referred to has been recognized and reasserted in many cases to which, with one exception, reference need not now be made. The case of the *Pensacola Telegraph Company v. The Western Union Telegraph Company*, 96 United States 1, illustrates the extent to which the principle enunciated in *Gibbons v. Ogden* may be carried. An act of Congress declared that the erection of telegraph lines should, as against state interference, be free to all who might accept its terms and conditions, and that a telegraph company of one state should not, after accepting them, be excluded by another state from prosecuting its business within her jurisdiction. A subsequent statute of the State of Florida granted to the Pensacola Telegraph Company the exclusive right of establishing and maintaining lines of electric telegraph as therein specified. This statute was held to be in conflict with the act of Congress, and therefore inoperative against a corporation of another state entitled to the privileges which that act conferred. The question whether or not the telegraph is an instrumentality of commerce was determined in the affirmative. Upon this subject Mr. Chief Justice Waite said: "Since the case of *Gibbons v. Ogden*, 9 Wheat. 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.

"The powers thus granted *are not confined to the instrumentalities of commerce*, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to

meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. *As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation."*

The long line of cases, of which the foregoing are illustrations, hold that commerce may be regulated by the regulation of its instrumentalities, and determine what those instrumentalities are. This brings us to a consideration of another line of cases which treat directly of what constitutes commerce itself. This line is as short as the other is long. For our purpose only two need be cited. The first undoubtedly enlarges the usual and common signification of the commerce clause. In the *Passenger Cases*, 7 Howard, 283, it was held that a state law which required the masters of vessels, engaged in foreign commerce, to pay a certain sum to a state officer, on account of every passenger brought from a foreign country into the state, or before landing any alien passenger in the state, was inoperative by reason of its conflict with the commerce clause of the Constitution. After referring to a *dictum* of Mr. Chief Justice Marshall in *Gibbons v. Ogden*, Mr. Chief Justice McLean says: "The transportation of passengers is regulated by Congress. More than two passengers for every five tons of the ship or vessel are prohibited, under certain penalties; and the master is required to report to the collector a list of the passengers from a foreign port, stating the age, sex and occupation of each, and the place of their destination. In England, the same subject is regulated by act of Parliament, and the same thing is done, it is believed, in all commercial countries. If the transportation of passengers be a branch of commerce, of which there can be no doubt, it follows that the act of New York, in imposing this tax, is a regulation of commerce. It is a tax upon a commercial operation,—upon what may, in effect, be called an import. *In a commercial sense, no just distinction can be made, as regards the law in question, between the transportation of merchandise and passengers.*

For the transportation of both, the ship-owner realizes a profit, and each is the subject of a commercial regulation by Congress. When the merchandise is taken from the ship, and becomes mingled with the property of the people of the state, like other property, it is subject to the local law; but until this shall take place, the merchandise is an import, and is not subject to the taxing power of the state, and the same rule applies to passengers. When they leave the ship, and mingle with the citizens of the state, they become subject to its laws."

This decision enlarges the meaning of the word "commerce," which ordinarily implies an exchange of property. We have seen that it may have many instrumentalities, of which one is transportation and another the telegraph. A regulation of all transportation in a certain locality must be a regulation of commerce in that locality, as it prohibits, except under given circumstances, the use of this instrumentality. Transportation, however, might be employed in other than commercial transactions, involving no exchange of property. The mere moving of property is not commerce in the common acceptance of that word, nor is the moving of men. When, therefore, the Supreme Court states that "in a commercial sense no distinction can be made" (as regards the law before it) "between the transportation of merchandise and passengers," it enlarges to that extent the meaning of the word "commerce." In view of the fact that transportation has grown to be such an important agency of commerce, there is sometimes an inclination to confuse the terms and regard them as being about synonymous. *It is well, therefore, to bear in mind that the Supreme Court has, in considering what is a regulation of commerce, merely extended the meaning of the word to include within its scope something in addition to, but not in limitation of its ordinary signification—an exchange of property.*

Whether or not the effect of the Passenger Cases is to insert the word "transportation" into the commerce clause by substituting the words "commerce and transportation" for the word "commerce" is a question which we are not at present called upon to discuss.

In *Paul v. Va.*, 8 Wallace, 168, it was held that a state

statute which enacted that no insurance company, not incorporated under the laws of the state passing the statute, should carry on its business within the state without previously obtaining a license for that purpose, and that it should not receive such license until it had deposited with the treasurer of the state bonds of a specified character, to an amount varying from thirty to fifty thousand dollars, according to the extent of the capital employed, was not in conflict with the commerce clause of the Constitution.

The following argument was made on behalf of the appellant: "The business of insurance is commerce. *It is intercourse for the purpose of exchanging sums of money for promises of indemnity against losses.* The term 'commerce' as used in the Constitution has been authoritatively construed to have a signification wide enough to include this subject." The appellant rested his case on the question whether or not an exchange of a sum of money for a promise of indemnity—regarding this as being in itself the substance of the transaction—is commerce. Of course, the court answered the question in the negative, and based its decision upon its answer.

Mr. Justice Field said: "The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. *These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them.* They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. *They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration.* Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce

between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

It is to be noted here that the court does not hold that exchange of property is not commerce, nor does it hint at a limitation of the ordinary signification of the commerce clause. It merely decides that making a contract (of insurance) is not a transaction of commerce, *because that contract is not an article of commerce* in any proper meaning of the word, and that such contracts are not interstate transactions because they are not executed until delivered by the agent. In this case the wrong question appears to have been presented to the court by the counsel for the appellant. A contract is an agreement to do or not to do a certain thing. No contract is an article of commerce in any other capacity than as a piece of paper. It may or may not be an instrumentality of commerce, according to the circumstances in which it is employed. The question which should have been presented to the court is whether or not the thing contemplated to be done by the contract of insurance, *irrespective of the form of the contract or the manner of its execution*, is commerce. A contract to make an exchange of wheat is not an article of commerce; but wheat is such an article, and its exchange is commerce. Likewise, a contract to make an exchange of money is not an article of commerce, but money is such an article. Its exchange is commerce, and as we have already seen, whatever regulates that exchange or its instrumentalities is a regulation of commerce.

The logic employed in *Paul v. Va.* is that the insurance business consists in an exchange of a contract for money, and that as a contract is not an article of commerce, the exchange is not commerce. If, however, the insurance business as transacted at the present day is something more; if it is not in substance the exchange of money for a contract, *but consists in what is contemplated by the contract, irrespective of the manner in which the contract is executed*, the case of *Paul v. Va.* has no further application. What, then, is the nature of insurance?

Before leaving *Paul v. Va.*, which has been treated in sev-

eral later cases as a precedent without being discussed, it may be well to add that the insurance business must be regulated by legislation either of Congress or of the states. If Congress has the right to regulate it, or any part of it, and is silent, it must be regulated by the states in the exercise of the police power. Owing to the magnitude of the business, to which reference shall be made later, the security of policy-holders requires strict supervision. Therefore, even if Congress may act in the matter, *public policy requires that until Congress does act, the states shall protect insurance policy-holders by adequate legislation.* As Congress has not acted, such legislation as that passed upon in *Paul v. Va.* is not at the present day in conflict with the commerce clause of the Constitution.

This brings us to a consideration of

2. THE NATURE OF INSURANCE.

In Biddle on Insurance, page 1, is the following: "The general term insurance is applied to two species of contract: insurance in respect of property and insurance in respect of life, which are not analogous in their elements, and which proceed upon different principles. Insurance in respect of property may be defined as an agreement by the insurer for a consideration to indemnify the insured against loss, damage or prejudice to certain property that may be during a certain period sustained by reason of specified perils to which the property may be exposed. . . . Though insurance in respect of property is technically a contract of indemnity, it is not, strictly speaking, intended necessarily to be an absolute indemnification of the insured nor to place him in precisely the same position he occupied before the loss, but the indemnity intended is *simply the repayment to the insured of so much of the insured subject matter as is lost at an estimated value or at its then market value.*

. . . The earlier form of insurance in England was probably marine; then came life, and in 1635 'estates combustible' were insured, and latterly a great variety of perils have been insured against, as injury from lightning, explosions, storms or tornadoes, breakage of plate-glass windows, whether in transit or in place; the dishonesty or infidelity of servants or officials, and also the liability of a contractor to pay for

injuries to his workmen. Insurance in respect of life, which is substantially the purchase by the insured from the insurer of a reversionary interest for a present sum of money, may be defined to be an agreement by the insurer *to pay to the insured or his nominee a specified sum of money*, either on the death of a designated life or at the end of a certain period, provided the death does not occur before, in consideration of the present payment of a fixed amount, or of an annuity till the death occurs or the period of insurance is ended. . . . Life insurance is not in any sense a contract of indemnity." The same authority says further on page 12: "The last essential element of the contract is a consideration, or, as it is usually termed, the premium. This, ordinarily, is money, though no reason is observed why it must necessarily be so; for a contract of insurance would no doubt be perfectly valid where the consideration agreed to be paid was otherwise than in money, as, for instance, *an insurance may be in exchange for goods*, or in consideration of work and labor done, or in payment of rent or for any other valuable consideration."

Insurance in respect of property is therefore *an agreement to pay* to the insured the value of so much of the insured subject matter as is lost, and insurance in respect of life is *an agreement to pay* the insured or his nominee a specified sum of money upon the happening of a certain event. In the former, the event upon which the payment is to be made may or may not happen; in the latter the event will happen, but at an indefinite time. In one case the uncertainty attaches to the event, while in the other it attaches to the time of the occurrence of the event, but in all lines of insurance the substance of the agreement is to pay. The form of the contract may or may not be one of indemnity. It may be expressed in a great variety of forms. Different contracts may have numerous individual peculiarities, but it is not with the form we have to do, it is with the substance. Every contract of insurance is an agreement to pay, for which there is a sufficient consideration. Such being the substance of the contract, the final object of insurance, or of the insurance business, is *an exchange of property*. This fact stands out most clearly, perhaps, in life insurance, where A. delivers annually

to B. a certain amount of property, and B. in return, at a given date, or upon the happening of a given event, delivers to A., or his appointee, a certain amount of property. The property generally consists of money. In fire insurance A. delivers to B. a certain amount of property, and B., upon the happening of a specified contingency, delivers to A. a certain amount of property. That the contingency never happen does not alter the fact. The chief object of the business of fire insurance is to deliver the property upon the happening of the contingency. In other words, while a fire-insurance contract is a conditional one, the substance of the business of fire insurance is not that the insurer will pay, but that he does pay upon the happening of the fire. This is equally true of all other lines of business in which contracts are employed. The contract of insurance contemplates an exchange of property between the insured and the insurer, and *vice versa*, and that exchange, not the contract, is the real business of the insurer. The usual discrepancy between the amount of premium and the amount of indemnity in other than life insurance is, of course, accounted for by the presence of conditions in the contract.

An examination of other branches of the business of insurance will show that in them all its object is an exchange of property in the form of money. At the office of the insurer we see premiums flowing in from all parts of the country, and payments on account of losses flowing out, the whole business being transacted through the medium of contracts or policies of insurance.

No large insurance company confines its operations within the limits of any one state, but extends its business into all parts of the country. In fact, a large portion of the business of most insurance companies is with persons residing in states other than those of their respective domiciles. The regulation of the business of these companies has become an important matter, and is intimately connected with the interests of all policy-holders. Every state has enacted legislation upon this subject, with an utter disregard of the legislation of the other states, and of such a character as to show clearly that the old Hellenic appetite "has been neither extinguished nor slaked."

In an excellent paper entitled "Significant Factors in National Regulation of Insurance," read before the National Convention of Insurance Commissioners at Detroit, in 1899, Mr. Max Cohen said: "A recent tabulation issued by the National Board of Fire Underwriters shows that fifteen states have anti-compact laws, twenty-one have anti-rebate laws, ten prohibit the use of the co-insurance clause, seven require special deposits from insurance companies, thirty have resident agent laws, twenty have valued policy laws and thirty-one retaliatory laws."

A specific instance of the nature of present insurance regulation is afforded by the laws of New Mexico, which require an insurance company organized outside of that state to deposit ten thousand dollars, cash (without interest), in the state or some county treasury, or in lieu thereof, bonds of the United States, or of that state, or of some county thereof, and invest its surplus in the same, or, "other indebtedness of any solvent dividend-paying institution, incorporated under the laws of the territory, or of the United States." There could be but one object of such legislation, and that is to market by force securities and "indebtedness of any solvent dividend-paying institution incorporated under the laws of the territory," which ought to be viewed with suspicion by every conservative investor. Under this law the surplus of a company authorized to do business in New Mexico could be invested in the mining stocks of some "wild-cat company" of that state, and be solvent. If, however, this surplus be invested in the first mortgage gold bonds of a leading railway company of another state, the insurance company is declared by the laws of that state to be insolvent and unable to pay its indebtedness. Comment is unnecessary.

In his paper, from which a quotation has already been taken, Mr. Cohen stated the following relative to the recent growth and present proportions of the insurance business: "A faint conception of the magnitude of the insurance business, and its essential scope for the needs of the people, may be obtained from this brief outline of but two of its most important branches—life and fire. Over thirteen million people are policy-holders in life-insurance companies and as-

sociations, and nearly two million hold benefit-certificates in the fraternal orders conducting life-insurance features. Of this total of fifteen million policies, nine million were issued by the industrial life-insurance companies alone, and are now held by the toilers in the nation's workshop for the protection of their families. *And these fifteen million of policies represent an aggregate of over thirteen billion dollars in outstanding life insurance. The amount of risks annually written and carried by the fire-insurance institutions for the protection of property and industries in the United States amount to over nineteen billion dollars.*"

The total volume of our national currency was reported on September 1, 1900, to be \$2,096,683,042. As fire insurance is at the present day only one branch of the insurance business, we may from the figures given above derive a fair idea of the enormity of that business.

It is impracticable within the scope of this paper to refer to all the evils incident to the regulation by state legislatures of the business of insurance carried on with the people of one state by corporations of another. They are such, however, as to make national regulation of this business an urgent need. That Congress has not power to institute and impose such regulation has never been held; and upon the basis of our examination it seems not improper to assume, until a contrary decision shall have been rendered by the Supreme Court, that Congress has this power. When we consider the common signification of the words "commerce among the several states," and find that judicial interpretation has not served to limit, but rather to enlarge, that common signification; and when we bear in mind that the essence of that portion of the insurance business we are considering lies in an exchange of property between the citizens of one state and an insurance corporation of another, it can hardly appear illogical to attempt to argue that insurance should be included within the term "commerce among the several states." If this be true, and the commerce clause shall be held to vest in Congress the power to regulate this business as well as those other branches and instrumentalities of commerce carried on among the several states, it is submitted that, as suggested by the language of Mr. Chief Justice

Waite above quoted, it is not only the right of Congress, but its duty, to see to it that the business of insurance among the states is not obstructed nor unnecessarily encumbered by state legislation.

Reginald H. Innes.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

ADVANCEMENTS.

In *McElroy v. Barkley*, 58 S. W. 406, the Court of Chancery Appeals of Tennessee holds that positive testimony of heirs **Sufficiency of Evidence** that certain sums paid to them by their intestate were in payment of services performed, and not as advancements, is sufficient to support a finding that such payments were not advancements, although there is testimony of conflicting statements made by the heirs. The danger of regarding such evidence as sufficient is apparent, but probably justifiable, since it is in the nature of testimony to rebut a presumption.

BANKRUPTCY.

The distinction between the contempt of court and the civil or criminal wrong which may arise from the same state of **Commitment for Contempt** facts is again drawn in the case of *In re Anderson*, 103 Fed. 854. The United States District Court (S. C.) there holds that an involuntary bankrupt who withholds property from his trustee is liable to punishment for contempt of court, and this, too, notwithstanding the provisions in Rev. St., § 990, providing that no person shall be imprisoned for debt in any state, on process issuing from a court of the United States, where, by the laws of the state imprisonment for debt has been abolished, the Constitution of South Carolina having forbidden such imprisonment. The court has power to make the order for the delivery of property, and hence an equal power to punish for disobedience of it. "But," says the court, "this power should be most cautiously exercised."

BANKS.

The general similarity between a cashier's check and a certified check, and the rule that for many purposes the latter **Deposit, Effect of Cashier's Check** appropriates a specific sum to meet a certain demand, gives plausibility to the contention of the petitioner in *Clark v. Chicago Title & Trust Co.*, 57 N. E. 1061. He claimed that the cashier's check given him, the cashier at the same time marking such

BANKS (Continued).

sum as paid to him, amounted to an assignment of it by the bank to him and gave him a preference over other creditors. But the Supreme Court of Illinois held otherwise: that such check was equivalent to an acknowledgment of indebtedness, and, though it changed the form of indebtedness, did not change the fact, the bank remaining a mere debtor of the petitioner.

BILLS AND NOTES.

A question on which conflicting opinions are held by the courts arose in *Brown v. Johnson*, 28 Southern, 579. In that case the defendant had given plaintiffs his note, and after delivery the plaintiffs added the name of another thereto as a co-maker. The Supreme Court of Alabama held this a material alteration and that the note was avoided by it. Even in Alabama this doctrine has not been consistently upheld. In a somewhat early case, *Railroad Co. v. Hurst*, 9 Ala. 513, an opposite view was announced, but this was subsequently departed from in that state, and the court acts under these later authorities in its decision. The basis upon which the alteration is regarded as material is, according to the court, that "the law proceeds on the idea that the identity of the contract has been destroyed—that the contract made is not the contract before the court."

CANCELLATION OF INSTRUMENTS.

In *Lockwood v. Lockwood*, 83 N. W. 613, an old woman had made a conveyance of certain land—practically all the property she possessed—to her son and his children on consideration of support consideration that the son should support her, and on the further consideration of natural love and affection. The son failed to keep his part of the contract, and his mother was sent away from his home. The Supreme Court of Michigan set aside the conveyance upon these facts, and in answer to the claim that the rights of the grandchildren under the deed would thus be destroyed through no fault or misrepresentation on their part, the court answers that as to them the conveyance is purely voluntary. The basis of the main decision does not distinctly appear, but the underlying theory seems to be that the mother had been induced by her son to do this, she having implicit confidence in him, that there is a strong resemblance to the case where confidence has been reposed and betrayed, or influence has been acquired and abused.

CONSTITUTIONAL LAW.

The Constitution of Illinois provides that private property shall not be taken or damaged for public use without just compensation, a restraint practically equivalent to that of the Fourteenth Amendment of the Federal Constitution. In *Fraser v. City of Chicago*, 57 N. E. 1055, it was held that this provision did not render the City of Chicago liable to a property owner whose property was depreciated in consequence of the location by the city of a smallpox hospital in the neighborhood. The court lays down the general proposition that for the doing of an act clearly within the power of the city under its police power, where injury is the necessary result of the doing thereof, no redress can be had, and regards this as clearly within the police power. The case is a hard one, but the court holds that no taking of property has occurred, since all property is held subject to the police power.

COVENANTS.

The modification of the old common-law rule, of the necessity for severance from the freehold in order to change what is affixed thereto into personalty, appears in *Asher Lumber Co. v. Cornett*, 58 S. W. 438, where the Court of Appeals of Kentucky holds that trees, when counted, marked and sold, to be cut and removed, become personal property, and, as a consequence, that a covenant of warranty in a bill of sale of such trees was not a covenant running with the trees, but was merely personal to the purchaser, and one who purchased from him could not sue thereon.

CRIMINAL LAW.

In addition to other peculiarities of Kentucky it appears that she can furnish some novel conduct on the part of prosecuting officers. In *Owens v. Commonwealth*, 58 S. W. 422, this attorney lay down on the floor and "holloed at the top of his voice" during his argument, for the purpose of bringing vividly before the jury the facts which he believed the testimony established. The Court of Appeals held that this was not such improper conduct as required the court to interfere.

On the other hand, in *Oldham v. Commonwealth*, 58 S. W. 418, the same court held it improper for the Commonwealth's attorney, when defendant objected to the testimony, to remark: "Oh, yes; I knew you would object, for it cooks your goose."

DEEDS.

The perplexing question of what acceptance of a deed is necessary in order to convey full title comes up again in *Knox Delivery, v. Clark*, 62 Pac. 334. In that case a husband was indebted to his wife, and becoming involved was requested by her to deed certain property to her, but he did not promise to do so. Afterward he executed certain deeds to her without her knowledge, and left them with the proper officer to have them recorded, and this was done; but they were not taken therefrom and given to the wife until the property had been attached by a creditor, and she was not shown to have had any knowledge thereof before such time. The Court of Appeals of Colorado holds that there was no delivery vesting title in the wife before the attachment. The court refers to the contention that where a deed is for benefit of grantee, its acceptance will be presumed; but claims that the presumption only obtains where the facts are unknown, and since the recorder had not been constituted the wife's agent and the facts showed no other delivery, delivery to him for recording was not sufficient to vest title in her. The court treats it as a case of contract and refers to the necessity for the "meeting of the minds." It is admitted that decisions are in existence not in harmony with this view, but it is claimed that it is supported by the great weight of authority, and this though the wife sought to accept after she knew of the deed.

It was further argued in this case that the conveyance was fraudulent as to creditors, but the court held that it was not so, that he had the right to prefer creditors, of whom his wife, in this case, was one.

DOWER.

A case in some points almost the reverse of this arose in New Hampshire. A statute of that state provides that no conveyance of lands in writing shall be defeated, as security or estate encumbered, by an agreement, unless it is inserted in the condition of conveyance. A husband before marriage had conveyed land as a security and received a bond for reconveyance on the payment of the debt. After his death his administrator paid the debt and had the property conveyed to himself for the use of the estate. It was held that the widow acquired no dower right in such property. *Hall v. Hall*, 47 Atl. 79. The court proceeds on the basis that the statute prevents this from being a mortgage, that hence the husband had not even an equitable title to the land, but "only a right to obtain title upon performing the condition of the bond;" and whatever rules might be as to dower in equitable estates, this was not sufficient to support the widow's claim.

EQUITABLE EASEMENTS.

The general doctrine of the enforcement of the agreements on the part of the several owners along a given block to build an injunction only up to a certain line is well known. We have to enforce a modification of this doctrine by the Supreme Court of Illinois in the case of *Ewertsen v. Gerstenberg*, 57 N. E. 1051. Such agreements existed in this case, but the restriction had not been uniformly observed by the property owners, who, like the defendant in this case, were bound by restrictions, nor for that matter by any number of them. The character of the property had changed (having grown into a business section) and in consequence, the enforcement of the restriction would have been a disadvantage to the property owners generally. On these grounds an injunction to prevent the defendant's building beyond the agreed-upon line was refused, the court holding that "all doubts [as to the right to enforce such restrictions in equity] should be resolved against restrictions of the free use for lawful purposes of property in the hands of the owner in fee." Of course this does not interfere with the defendant's liability at law, but such liability would under the facts be a doubtful source of substantial damages to a plaintiff.

HUSBAND AND WIFE.

The tendency of the courts to restrict the operation of the legislative acts in regard to the rights and liabilities of married women is in evidence in numerous cases. A fresh illustration occurs in the case of *Ott v. Hentall*, 47 Atl. 80, where the Supreme Court of New Hampshire held that the statutes of that state, enabling married women to hold property to their own use, and enlarging their rights and liabilities, do not affect the wife's right to pledge her husband's credit for necessary medical attendance, nursing and board while compelled to live apart from him by his misconduct. The court does not examine to any extent the basis of the husband's liability, assuming as a principle to start with that it is an obligation of the husband suitably to maintain his wife. A ground to relieve the husband might have been found in the theoretical origin of this rule, from the fact that at common law the husband practically controlled all his wife's estate and therefore had in consequence a duty of support. When this estate is given back to her control, it might be argued, such duty ceases; but the court takes the conservative position—a position which is certainly supported by common sense.

INSURANCE.

In *Metropolitan Life Insurance Co. v. Blesch*, 58 S. W. 436, the Court of Appeals of Kentucky, while admitting that adjudications as to the right of a party to recover money paid voluntarily under a mistake of law, differ greatly in the states of the Union, many of them denying relief, holds that the law in Kentucky is well settled and allows recovery of such money. The rule is applied to the case where a daughter procured a policy upon the life of her father without his knowledge or consent. The court held such policy void as against public policy, but being convinced that she had paid in good faith and in ignorance of the law, allowed her to recover what she had paid the company.

JUSTICES OF THE PEACE.

The general rule that a judicial officer is not to be held liable in a civil action for the performance of his official duty, provided he has jurisdiction of the person and the subject-matter, is applied by the Court of Appeals of Kentucky, in *Dixon v. Cooper*, 58 S.W. 437, to the case where a justice of the peace acts within his jurisdiction in issuing a warrant and trying the defendant thereunder. It is held he is not liable civilly, though the acts charged did not constitute an offence and though he was actuated by malice.

POWERS.

The broad general rule that a person should not "take all the benefits of property with the right to dispose of it at his death as he pleases, without the same being subject to the payment of his debts," since this is an "idea inseparable from the institution of property," is a principle that is continuously appearing and reappearing in the decisions. The Court of Virginia rather reluctantly follows former authority, and decides this rule not controlling in the case of *Humphrey v. Campbell*, 37 S. E. 26. There a trust deed directed trustees to pay the income of an estate to the testatrix for life, and power to her to dispose of estate by will. She gave to certain persons other than those who would have taken by the laws of descent. Held that the estate was not liable for her debts. The main reason given is that since the appointment is to be by will she can derive no control of such trust estate. A Pennsylvania case, *Commonwealth v. Duffield*, 12 Pa. 277, is cited, among others, as holding a contrary view.

SALES.

An offer was made by a firm to A. to sell him bran at \$7.00 per ton f. o. b. at F., and closed by "hoping to receive your order." On receipt of this A. immediately telegraphed: "Ship fifty tons as per your letter." Reasonable-ness of Amount of Goods Ordered The Court of Chancery Appeals of Tennessee, in *College Mill v. Fidler*, 58 S. W. 382, held this a binding contract. The point was made that the amount ordered was unreasonably great. The court regarded it otherwise on the ground that, though it was proved that an order for this amount was unusual, one or more retail merchants at the place had ordered that amount at one time before this, and that the amount ordered did not exceed the demand of A.'s trade, and that there was no proof that he knew what quantity the company had on hand, or what it could produce in a given time. These, in the opinion of the court, are criteria to judge of the reasonableness of the amount ordered. It is intimated that a different holding would be had on a "catch-order."

WILLS.

The Supreme Court of New Hampshire in *Ellis v. Aldrich*, 47 Atl. 95, discusses the effect of the statute of the state providing that "every devise or bequest by the husband or wife to the other shall be holden to be in lieu of the rights which either has by law in the estate of the other, unless it shall appear by the will that such was not the intention." It is held that this provision, where applicable, renders the wife or husband a purchaser of the bequest or devise, and hence as entitled to a preference over the general legacies in case there are not sufficient assets to pay all in full. Purchase of Legacy

The narrow boundaries of the rights of an executory devisee with respect to the property devised appear in *Vaughn v. Tealey*, 58 S. W. 437. In that case an estate had been devised to A. with an executory devise to others. An order was made charging a certain expense to the corpus of the estate, and in the proceedings for this the executory devisees were not parties. The estate of A. under the terms of the devise having become divested, the question as to the legality of the order was raised, and it was upheld notwithstanding the non-joinder, the court saying that A. "occupied such a relation to the estate as to represent all interests . . . so far as concerned the preservation of the estate." Executory Devise

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ACTION FOR WRONGFUL DEATH—EFFECT OF PRIOR RELEASE BY PARTY INJURED.—*Southern Bell Telephone and Telegraph Co. v. Cassin et. al.*, 36 S. E. (Ga.) 881, (1900). Cassin was injured by the defendant company, May 6, 1892. He brought suit, and pending the action the company paid him \$2,500, taking a receipt which read as follows: "In full settlement of my action against said company now pending in the city court of Atlanta, and also in full settlement of all and any claim for damages, on my part, arising out of the injury received by me on or about May 6, 1892." Cassin died about five years after the injury, and his wife brought suit, on the ground that the death was due to the company's negligence. The wife died pending suit, and it was continued for the benefit of the children. Judgment for plaintiff. On appeal, judgment reversed; two judges dissenting.

The majority opinion commends itself to reason, and is based on the great weight of authority. Its grounds were, that the wife's right in her husband's life are subordinate to his course of action during his life; that the husband, by contributory negligence, settlement of the wrong by acceptance of payment, and by contract with the defendant, may free the latter from liability to him; and that, finally, to allow the wife to recover, when a settlement had been made by the husband, would destroy the likelihood of a compromise, and directly encourage litigation.

The dissenting judges found some trouble in dealing with prior decisions of their own court, but they satisfied themselves with the following distinction: Where the deceased does some act prior to or concurrent with the injury, and by it prevents any liability of the defendant from arising, the wife cannot recover. But if the defendant once becomes liable to the injured party, a right of action accrues to those entitled by law to compensation *for his death*, i. e., widow and children, and when death occurs the right is full and complete. The injured party, before death, can do nothing to impair this cause of action. The theory is—a cause of action is given to the injured party, which he can use as he sees fit, and, by force of the survival statute, upon his death it vests in his personal representative. Another distinct and separate cause of action for the homicide is given to the widow and children. This view is supported by a number of decisions, some of which resulted from the peculiar nature of the statutes which controlled them. For instance, in Massachusetts, the statute (*Pub. Stat.*, c. 112., § 212) is penal in its effect. Under it, if the negligent act of the defendant causes death, he must pay a fine in damages (limited), recoverable by indictment for the use of the family. In *Com. v. Boston & L. R. Corp.*, 134 Mass. 211 (1883), it was held that negligence on the part of a passenger was no more a defence to an indictment for damages than it would be in a murder case. The damages belong to the next of kin, and not to the estate of the party injured. *Bowes v. Boston*, 29 N. E. 633 (1892). This distinction would lessen the effect of a Kentucky case, *Donahue v. Drexler*, 82 Ken. 157 (1884), in which case the party mortally injured by the criminal use of a deadly weapon executed a release to the defendant. The wife brought suit and recovered. The court said the statute created a new cause of action, but that it was “a highly penal statute.” Other states which accord with the dissent are: Washington, *Adams v. R. R.*, 95 Fed. 938 (1899); Kansas, *R. v. Bennett's Est.*, 47 Pac. 183 (1896), under a statute very similar to Lord Campbell's Act.; Mississippi, *R. R. Co. v. Phillip*, 64 Miss. 693 (1887); Arkansas, *Davis v. R. R. Co.*, 13 S. W. 801 (1890).

All the States, beginning with New York, in 1847, have passed statutes creating a cause of action for the benefit of the family, when the death of a member has resulted from a wrongful act. The majority resemble closely Lord Campbell's Act (1846). Though English judges have distinctly affirmed that the act created a new cause of action, the cases hold that a settlement by the husband will bar the right of the wife. *Read v. R. R.*, 9 Best & S. 714 (1868);

Wood v. Gray, App. Cases 576 (1892). The English rule, in another aspect, has been settled as follows: If the personal representative sues the defendant in tort for the benefit of the widow and children, and recovers damages for the death, he cannot later sue in tort for the injury to the person of the deceased, but he can bring an action of contract and recover "the expense of the decedent's sickness, nursing, medical attendance, and the like." *Bradshaw v. R. R. Co.*, 10 C. P. 189 (1875); *Leggett v. R. R.*, 1 Q. B. D. 599 (1876); *Pulling v. R. R.*, 9 Q. B. D. 110 (1882).

The Read case is generally followed in this country. Tiffany, after a consideration of all the statutes and citing many cases, states the rule as follows: "If the deceased, in his life-time, has done anything that would operate as a bar to a recovery by him of damages for the personal injuries, this will operate equally as a bar in an action by his personal representatives for his death. Thus, a release by the party injured of his right of action, or a recovery of damages by him for the injury, is a complete defence in the statutory action." "Death by Wrongful Act," § 124.

In New York the courts admit that the statute creates a new cause of action, yet it has been ruled that "this new cause of action is barred if there had been a previous judgment for the injury." *Littlewood v. Mayor*, 89 N. Y. 24 (1882).

The Pennsylvania rule is clearly stated in *Hill v. R. R.*, 35 Atl. 997 (1896). "The widow did not have such an independent action for injuries causing her husband's death that he could not, in his life-time, release or compound it."

Even where a statute has been construed to give two causes of action, and the right to maintain two concurrent suits, a court has held that the party injured could work "an extinguishment of the primary cause of action" (Wisconsin). *Brown v. R. R. Co.*, 78 N. W. 773 (1899). It can be said that while the authorities are fairly well balanced on the question of allowing concurrent suits, they generally agree in admitting the conclusive effect of a release. See also *Halton v. Daly*, 106 Ill. 131 (1883). *Hecht Case*, 32 N. E. 302 (Indiana, 1892); *Lubrano v. Atlantic Mills*, 32 Atl. 205 (Rhode Island, 1895). In this last case the court was influenced by the confusion of damages that would result if the defendant were subjected to two liabilities. Therefore if the personal representative of the deceased sued for the family and recovered he could not afterward sue for injuries to the estate. "The measure of pain and suffering or the estimated damage to one's estate cannot so definitely be marked as to limit the liberality of a sympathetic jury."

F. K. S.

BOOK REVIEWS.

THE LAW OF REAL PROPERTY, Vol. VI. Edited by E. E. BALLARD. Logansport, Ind.: The Ballard Publishing Company, 1900.

This is the sixth of a series of volumes on the Law of Real Property which is being issued annually by the Ballard Publishing Company. Each volume is intended to show the entire progress of this branch of the law throughout all the states during the preceding year, and the general purpose of the series, as expressed in the first volume, is "to furnish a reliable medium that shall keep . . . the profession familiar with all the growth and change of the law of real property affected by current legislative enactments and judicial opinions; make them acquainted with the different systems of statute law on the subject, as created by the several states in the Union; keep before them the common law which yet remains in force, pointing out wherever it has been confounded with statutes or mutilated by careless judges; and as far as possible relieve both counsel and courts of the wearing drudgery of hunting for things which are hard to find, and save them from the embarrassment of following blind guides. . . ."

The reading, page by page, of the reports of the United States Supreme Court, and of all the reports of the courts of last resort of all the states, that are issued during each year, seems a stupendous task; yet such is the actual method adopted by the compilers of this work, and it is only by a careful process of exclusion that those cases which concern the law of real property are finally selected. From among these especial attention is paid to re-reporting in full or in substance those cases, which overrule other cases upon material points, which construe important statutes not before construed, or which make some application of legal principles to circumstances arising out of new inventions or changes in social conditions. The remaining cases are then either reported as especially noteworthy and supported by annotations from the authorities, or are epitomized and cited together as supporting the same legal principle.

From this mere outline of the method employed in compiling these volumes in furtherance of the purpose as stated, it must be evident that they constitute a most complete and concise compendium of the law of real property and one possessing the great advantage of containing all the recent decisions and statutes by reason of its being brought "up-to-date" year by year.

The practical value of each volume and of the series for the busy lawyer, is further enhanced by the most complete system of indexing used. Not only each volume indexed in such concise detail that the substance of each page can be seen at a glance by merely look-

ing at the index, but with each new volume a new and revised index of the subject-matter of all the volumes is issued. This index is at once simple to understand and most complete in detail.

C. T. B.

HAND-BOOK OF THE LAW OF BILLS AND NOTES. Third edition. CHARLES P. NORTON. St. Paul, Minn.: West Publishing Company, 1900.

The value of the Horn-book series to the student and practitioner cannot be disputed. The plan of stating leading principles in bold-face type, enlarging upon the principles in the text saves much labor, and in addition fixes them firmly in the mind. This edition, according to the editor, Francis B. Tiffany, has been made necessary by the passage of the New York Negotiable Instruments Law (1897). The complete text of the statute is given in the appendix, and many references are made to it, changes from the existing law being pointed out. The industry of the author is proved by a large collection of cases. One ground of criticism may be stated to be that the book is too much like a mere digest of cases, and does not aim at presenting a judgment of decisions, as they do or do not conflict with the well established principles controlling the law of negotiable instruments. The foot-notes are very comprehensive. All cases which appear in case-books now in common use in law schools are cited in large type.

F. K. S.

THE LAW OF BILLS, NOTES AND CHEQUES. Second edition. By MELVILLE M. BIGELOW, Ph. D. Boston: Little, Brown & Company, 1900.

The first edition of this work, published in 1893, was well received by the public, and renders unnecessary an extended criticism of the second edition. The former was written with special reference to the English Bills of Exchange Act, 1882. Suggestions were made wherein the provisions of the act could be well used as a basis for the reform of the American law. The same plan, more thoroughly carried out, with the Negotiable Instruments Law of New York (1897) as the basic code, has been followed by the author in the second edition. Since the New York law was enacted a number of states have codified the law of negotiable paper as applied within their limits. Some important differences in legislation have therefore been pointed out. The full text of the act is given, and the Colorado statute is compared in some detail.

In general this edition is a marked improvement over the former. Several chapters are added, embodying the law that regulates the contracts of the certifier and vendor of negotiable paper. The text, owing to frequent references to the New York law, is generally revised, and its contents suggested by pointed *side notes*. At times, state doctrines are subjected by the author to severe criticism. He

clearly points out the fallacy of the New York rule which holds that an endorsement without recourse operates as a conditional delivery. His aim is to ascertain the reason of rules and make their just or unjust application evident to the reader. Subjects, like absolute defences, equities and notice of dishonor are treated with special care and thoroughness. The list of cases has been made more comprehensive. They are contained, in large part, in the author's "Cases on Bills, Notes and Cheques," students' series.

F. K. S.

ESTOPPEL BY MISREPRESENTATION. By J. S. EWART. Chicago: Callaghan & Co. 1900.

To take a principle of limited application and by patient research and scholarly speculation to widen it into a general and far-reaching theory is to achieve a distinct professional triumph. Such a triumph, we believe, has been attained by Mr. John S. Ewart. In this book our author attempts to show that estoppel is not a subordinate, but an underlying, principle of law, and that many cases heretofore regarded as exceptions to the law may be explained consistently on the theory of estoppel.

Mr. Ewart only professes to deal with estoppel by misrepresentation, omitting from his consideration estoppel by contract, the only other important kind of modern estoppel. In accordance with his plan the author gives a valuable scientific classification of misrepresentation as follows: "Misrepresentation may be (1) personal or (2) assisted; (1) direct or (2) indirect; (1) active or (2) passive; (1) expressed or (2) implied."

That portion of Mr. Ewart's analysis which divides estoppel by misrepresentation into "personal" and "assisted," we consider especially logical and useful, since it emphasizes an obvious distinction in the subject, and one which has remained too long without definite recognition.

In Chapter XIV of his book, our author discusses the much quoted rule in *Lickbarrow v. Mason*, 2 T. R. 63, in a very interesting manner and at some length. Briefly the facts of the case were these: A., an unpaid vendor, shipped certain goods to B., sending him at the same time an indorsed bill of lading for them, which B. received before he got the goods. B. immediately sold the bill of lading for value to C. Before the arrival of said goods B. failed, and A. asserted a right to stop the goods *in transitu*. This, however, the court denied, holding that C., the innocent purchaser for value of the bill of lading, had a prior claim. C.'s right, however, was held not to be based upon the estoppel of A.; but upon the following equitable principle, namely, "We may lay it down as a broad general principle, that whenever one of two innocent persons must suffer by the acts of a third, he who enables such third person to occasion the loss must sustain it." Mr. Ewart ably contends that this rule is on all fours with his definition of estoppel by assisted misrepresentation, and he meets possible objections to this view in a manner which convinces one of the strength of his theory.

It seems strange indeed that Mr. Ewart should be the first man to realize the possibility of reconciling the many anomalous cases in the law of bills and notes, sales, priorities of real estate, void and voidable instruments, partnership and agency, along the lines of estoppel by misrepresentation. However, the author is, of course, deserving of all the more credit from the fact that his axe has fallen in a virgin forest, and when we remember that he must have hewed his way forward, with no blazed path to guide him, his performance seems admirable. The theory he champions may be too inclusive; but that is a fault of all experimental plans, and doubtless it will be moderated in time. Taken as a whole, the book appears to us a clear and terse exposition of a novel and interesting design.

T. J. G.

ELEMENTS OF AMERICAN JURISPRUDENCE. By WILLIAM C. ROBINSON, LL. D. Boston, Mass.: Little, Brown & Company, Publishers.

No one who examines this work can help being impressed at the outset by the masterful analysis which Mr. Robinson has made of his subject. He shows a thorough grasp of every portion of the vast field and presents a thorough outline of it as he intends to deal with it. The analysis appears to be arranged very much like that of Kent's Commentaries, but, of course, our author has dealt with it in a very different manner owing to his wishing to attain a far different object and reach quite another class of readers.

Our author's aim was, as he tells us in his preface, "to enlighten every educated citizen who aspires to the intelligent discharge of his political duties," "to assist the various grades of students in their preparation for the different positions in political life;" and "he has had in view the needs of those who are pursuing courses in political science in our universities and colleges."

Thus we see that his aim has been to aid every citizen and have his book serve as an introduction to deeper studies for those who propose making the study of law their life work.

As to his success in carrying out his plan hardly enough can be said in commendation. It is one of the most difficult of tasks for an author to give to his readers a clear and complete idea of so vast a subject within the compass of a few pages; nevertheless this is what Mr. Robinson has undertaken and his success has been almost beyond belief. His style is clear and elegant. He has given just enough under each head to furnish a beginner with a comprehensive idea of it and prepare the minds of young law students for their more difficult future work.

The name of the book, "Elements of American Jurisprudence," gives us an idea of the scope of the work and how much the author had to contend with in condensing so much legal learning into the small compass of one book. Although but a limited space could be given to each branch of the different subjects, still, throughout the work we are supplied with references to standard works, should we desire to pursue our inquiries farther upon any particular subject.

It is our opinion that Mr. Robinson has made a most valuable addition to the literature of our country, and one which will be of almost incalculable value to young law students, who may now at the very outset of their career get a comprehensive idea of the work before them, instead of floundering around for months, and perhaps years, before they see to what end their labors tend.

M. H.

AMERICAN LAW. A TREATISE ON THE JURISPRUDENCE, CONSTITUTION, AND LAWS OF THE UNITED STATES. By JAMES DE WITT ANDREWS. Chicago: Callaghan & Co. 1900.

In the preparation of this treatise the author has carefully borne in mind Lord Bacon's statement that "institutes ought to have two properties: the one a perspicuous and clear order or method; and the other a universal latitude or comprehension, that the student may have a little pre-notion of everything, like a model toward a great building." The Introduction treats of the development of the law, briefly tracing its growth from the system of government in Ancient Greece. The subject is then divided into four parts: First, The Law of Persons—Status, under which is considered in a thoroughly practical manner, the various rights, duties, capacities and privileges of public and private persons; second, The Law of Things, the word "thing" comprehending whatever may, according to our law, become the object of a right, and including, therefore, the treatment of contracts; third, The Law of Actions, which deals with procedure, courts and remedies; and fourth, The Law of Crimes, occupying but a few pages.

The work would not be less valuable if the author's censure of Blackstone's methods were curtailed; yet it should be welcomed, not only by students and lawyers, but also by those who aim to possess a general knowledge of the law. Well planned and carefully executed, it is clear, concise, and modern—the latter attribute a most valuable one in our ever-changing science.

The table of cases is well arranged, and the volume is thoroughly indexed.

H. J. S.

THE POLICE POWER OF THE STATE AND DECISIONS THEREON AS ILLUSTRATING THE DEVELOPMENT AND VALUE OF CASE LAW. By ALFRED RUSSELL, LL. D. Chicago: Callaghan & Co. 1900.

Mr. Russell's book, dealing with the "Police Power," is a useful addition to our abundant crop of learning on the general subject of Constitutional law.

Our author, in postponing the definition of police power to the very end of his book, says with much force:¹ "Definition is always perilous in the law, and no definition of our topic need now be attempted. What the police power is, and what its extent and

¹ p. 25.

limitations are, can only be ascertained by the gradual process of judicial inclusion and exclusion as the cases presented for decision require, with the reasoning upon which such decisions may be found." (*sic*). He then proceeds to take up the leading cases as showing the outlines of that Protean subject which seems to be all kinds of a rule at the same time. After considering its general features he goes on to show how it is modified by the Federal Constitution in criminal cases (Chap. III); in respect to the Eleventh Amendment (Chap. IV); with regard to the Fourteenth Amendment (Chap. V); as to the public health and safety (Chap. VI); as to corporations (Chap. VII); as to the Commerce clause (Chap. VIII); and as to "property in business" (Chap. IX). In this last chapter our author sums up his general conclusions in eleven propositions, which seem to be as sound as generalities ever are. The first of these propositions states in a concise way the elementary learning on the subject.

"1. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by a legislature of a State essential to the safety, health, peace, good order, morals and convenience of the people of the State."

The remaining ten propositions are corollaries of the first one and tend to elucidate the general subject.

We note one or two small inaccuracies, *e. g.*, p. 4, "The development of our law began during the long period of the Roman occupation [of England], which left an indelible impress [on the law of that country]." This last statement must surely have been a slip of the pen.¹ Altogether, however, Mr. Russell's "Police Power" is a useful book for study preparatory to taking up the subject more exhaustively for one's self by an examination of the cases, which are, on this subject, more than any other in law, the best exponents of the law.

E. B. S., Jr.

WASHBURN'S MANUAL OF CRIMINAL LAW, third edition, with notes by MARSHALL D. EWELL, M. D., LL. D. Chicago: Callaghan & Co. 1900.

Students of law will welcome the appearance of this new edition of a popular book. The ever-growing tendency in the law toward bulky volumes entails many disadvantages for the beginner; and for a text-book a work that aims at simplicity and conciseness is certainly preferable to one aiming rather to be comprehensive and complete. This third edition of Washburn, while adding new references which bring the criminal law in the United States down to the present time, has not so multiplied the old notes as to increase unduly the size of the volume.

Not only is Washburn's "Criminal Law" concise, but it has the added merit of being eminently practical. Discussions of the theory and philosophy of the law have no place; the law is stated as a fact,

¹See Pollock and Maitland's "History of English Law," Introd. xxxi, and Sir Walter Besant's "London."

and without editorial comment. More than half of the book is given over to an account of criminal procedure, much in the manner of the latter half of the fourth book of Blackstone.

Although the object of the book is to set forth merely the common law of crimes, yet numerous references in the notes to state codes and statutes furnish information of changes in the common law made by acts of the state legislatures. By far the greater number of citations are, in the text, from the Massachusetts reports, and, in the editor's notes, from the Illinois reports. But criminal law does not admit of as many variations as does the purely private law, and consequently the principles of the law set forth in the book may safely be accepted, in a general way, in any jurisdiction. There are, it is true, some statements made that would not apply to Pennsylvania law, but these are of minor importance, and not sufficient to render the book either inaccurate or, for its purpose, incomplete.

To universities and schools of law which do not follow the case system, this book may safely be recommended for class-room use.

H. S.

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